United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

625

JOINT APPENDIX.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 19,222

FERRELL-HICKS CHEVROLET, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

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JOINT APPENDIX.

1 UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ferrell-Hicks Chevrolet, Inc.
and
Andrew Burinskas, an Individual } Case No. 13-CA-4886

NOTICE TO SHOW CAUSE.

On April 22, 1963, a majority of a Board Panel (Member Leedom and former Member Rodgers) issued a Decision and Order, 142 NLRB 154, dismissing the complaint in this proceeding on the ground that the General Counsel had failed to establish by a preponderance of the evidence that Respondent's discharge of Andrew Burinskas, also known as Andy Burns, had violated Section 8(a)(3) and (1) of the Act. Chairman McCulloch, the third member of the Panel, dissented because he agreed with the Trial Examiner that the discharge had been prompted by Respondent's animus against Burinskas' union activities.

Burinskas then petitioned the Court of Appeals for the District of Columbia Circuit for review of the Board's Order. On January 8, 1964, the Court remanded the case to the Board for reconsideration.[1] The Court stated as its reason for the remand that it had:

> ". . . difficulty in apprehending the basis for the Board's Order by reason of ambiguities in its Decision deriving from (1) the Board's treatment of the Examiner's findings with respect to the credibility of certain witnesses for the employer and (2) uncertainty

1. *Burinskas* v. *N.L.R.B.* ..... F. 2d ..... (C. A. D. C.) January 8, 1964.

as to the extent to which the Board rejected the Examiner's inferences drawn from the evidence found credible."

As the Board Panel which originally considered this matter cannot be reconstituted, the questions presented by the Court's remand have been considered by the full Board. A majority of the Board is now of the opinion that in accepting the Trial Examiner's resolutions of credibility based on the demeanor of the witnesses it should also have accepted the inferences which the Trial Examiner drew from the facts as he found them. The Trial Examiner discredited the testimony of Respondent's witnesses, Haggerty and Frachalla, as to their asserted reasons for discharging Burinskas. No credible reason for his discharge having been established, it follows that the inferences drawn by the Trial Examiner from the credited testimony of Burinskas are entitled to great weight. The contrary inferences drawn by the majority members of the Board Panel were based in part on an acceptance of discredited testimony, and for that reason are less supportable than the inferences of the Trial Examiner.

The Board therefore proposes to issue an Order setting aside its previous Order and adopting in all respects the findings, conclusions, and recommendations of the Trial Examiner. In accordance with the mandate of the Court that the parties be afforded full opportunity to be heard upon any proposed action, notice is hereby given to the parties to show cause, within 20 days hereof, why the action proposed above should not be taken.

Dated, Washington, D. C., July 28, 1964.

Frank W. McCulloch, *Chairman*
John H. Fanning, *Member*
Gerald A. Brown, *Member*
National Labor Relations Board

(Seal)

2 Member Leedom, dissenting:

I am unable to agree to the majority's action here in proposing to set aside the Board's Decision and Order in this proceeding.

The Court of Appeals remanded this proceeding to the Board "for reconsideration of the Decision *with a view to its clarification.*" (Emphasis supplied).[2] I consider it improper for the Board, in this posture of the case, to reverse on its own motion its original decision finding that the Respondent did not violate Section 8(a)(3). Having accepted the above remand, the Board, it seems to me, was mandated to take action only with respect to the clarification of its decision.

Further, I disagree with the majority on the merits. In its original decision, the Board (Chairman McCulloch dissenting) found that the Respondent had discharged employee Burns because he had been disrespetful to supervisors and because he had attempted to create dissension between supervisors Frachalla and Haggerty. I believe that this conclusion is amply supported by the record and I would reaffirm the Board's original finding, with the following clarification, requested by the Court of Appeals, regarding the Board's treatment of the Trial Examiner's credibility findings. The Trial Examiner, discrediting the testimony of several of the Respondent's witnesses, including the testimony of Frachalla and Haggerty that they had discharged Burns because of his disrespectful remarks and because of his attempts to create dissension, found that Burns was discharged because he had engaged in union activity in violation of Section 8(a)(3). The Board accepted the Trial Examiner's resolutions based on credibility but nonetheless reversed the Trial Examiner and found that the Respondent did not violate Section 8(a)(3).

2. *Burinskas* v. *N.L.R.B.* ..... F. 2d ..... (C. A. D. C.), 55 LRRM 2300.

The Board thereby intended only to accept the Trial Examiner's credibility resolutions of testimonial conflicts as to the underlying facts.[3] It was not accepting his rejection on grounds of credibility of the testimony by Frachalla and Haggerty as to their subjective reasons for the discharge nor was it accepting his conclusory finding that Burns' discharge was for discriminatory reasons. The determination that Burns was discharged for discriminatory reasons is a legal conclusion which the Board must make on the basis of all the facts in the record. In deciding such issue, the Trial Examiner's conclusions are not entitled to special weight.[4] In the light of (1) the undisputed facts that Burns had acted disrespectfully and had attempted to create dissension between his superiors, the further fact that (2) the record was devoid of conduct violative of 8(a)(1), and (3) the Board's view that the Respondent was not "strongly opposed to the Union," the Board found that Burns was discharged for cause. I would adhere to that conclusion and affirm the dismissal of the complaint.

I would therefore issue a Notice to Show Cause as to why the Board should not reaffirm our original Decision and Order and clarify such decision in the manner set forth above.

Dated, Washington, D. C., July 28, 1964.

Boyd Leedom, *Member*
National Labor Relations Board

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3. For example, the Trial Examiner's discrediting of the explanation by the Respondent's President of its damaging statement to Burns (See the Intermediate Report, footnote 2).

4. I specifically disagree with the statement of the majority herein that the Board "in accepting the Trial Examiner's resolutions of credibility based on the demeanor of witnesses . . . should also have accepted the inferences which the Trial Examiner drew from the facts as he found them."

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD.
* * (Caption—13-CA-4886) * *

ANSWER OF FERRELL-HICKS CHEVROLET, INC. TO BOARD'S NOTICE TO SHOW CAUSE.

Now comes Ferrell-Hicks Chevrolet, Inc., the employer in the above-entitled proceeding now again before the Board (hereinafter referred to as the employer), by Karl W. Grabemann, its attorney, who takes exception to the action taken, and proposed to be taken, by the Board as reflected in its Notice to Show Cause dated July 28, 1964, and makes answer as follows:

1. In its Order of January 8, 1964, the Court of Appeals for the District of Columbia Circuit did *not* remand the above-entitled matter to the Board for a full scale "reconsideration," as implied by the present Board majority in its Notice, but such remand was made "to the Board for reconsideration of [its] Decision *with a view to its clarification* [emphasis added]." This is made patently and manifestly clear in the Court's Order, and yet the present Board majority has elected to ignore and defy the Court's mandate. Instead of complying with the mandate of the Court of Appeals, the present Board majority would now *sua sponte* reverse the Board's original decision wherein it was found that the employer did not violate the Act. Needless to say, the employer strongly objects to this proposed action by the present Board majority. There is clearly no warrant or authority for such proposed action in the Court's mandate to the
2 Board. Therefore, the employer submits that the extraordinary action proposed by the present Board majority is grossly improper, irregular and prejudicial to the rights of the employer.

2. In the course of the review proceedings before the Court of Appeals, the Board advanced the position that its original decision was proper and that the petition for review should be denied. In this connection, the Board filed an excellent and persuasive brief with the Court in support of its position. Furthermore, at the time that the case was argued orally before the Court, the attorney appearing for the Board in effect took the position that the Court should remand the case to the Board and mandate it to *clarify* its original decision in the event that the Court should experience difficulty regarding the Board majority's treatment of the credibility findings of the Trial Examiner as reflected in the Board's original decision. Inasmuch as the Court did experience such difficulty, and stated as much, the remand to the Board was made to obtain *such clarification,* and this much the Court has *also* stated. Thus, the employer submits that the present Board majority is now, particularly in context with the *narrow scope* of the Court's remand, estopped and precluded from causing an Order to issue which is clearly at odds with, and contradictory to, the Board's arguments advanced before the Court. Moreover, inasmuch as the employer *relied* particularly upon the Board's oral argument before the Court as to what the Board would do if the case were remanded to it, the employer further submits that the Board majority's proposed Order is unconscionable and reprehensible. Even if the present Board majority has concluded, as it appears to have done, that it is entirely proper to fully ignore the mandate of the Court in connection with the proper scope of the remand to the Board, the least that the present Board majority might have done is to adhere to the representations advanced to the Court in regard to the action to be taken by the Board in the event of a remand. By failing to adhere to its representations, the employer further, and finally, submits that the present Board major-

ity now proposes to engage in action which can fairly be characterized as a fraud upon the employer *and* the Court.

3. The present Board majority recites in its Notice that the "questions" presented by the remand of the Court of Appeals were considered by the "full Board," inasmuch as the Board panel which originally considered the above-entitled matter could not be "reconstituted." Assuming *arguendo* that there was any need to reconstitute the original Board panel for the purpose of considering the Court's remand with a view toward clarification of the Board's original position, there exists no apparent reason whatever why the Court's remand now demands *full* Board participation. In view of the fact that one of the majority of the Board panel issuing the original decision is presently still a member of the Board, we submit that, under all the circumstances, and particularly in context with the Court's clear and unequivocal mandate that the Board was to *clarify* the original decision, the remaining member of the majority of the Board panel issuing the original decision could, and should, *alone* have clarified the original decision.

4. The mandate of the Court of Appeals directed the Board to afford "full opportunity" to the parties to be heard in connection with any action proposed to be taken by the Board as a result of the Court's remand. Thus, we submit that the Board should have afforded all parties opportunity to be heard in connection with the *decision-making process* incident to the issues raised by the remand. This is particularly so where the Board majority has determined to take action, *sua sponte,* wholly outside the mandate of the Court and to the resulting prejudice of the employer. In any event, none of the parties in the above-entitled matter were ever afforded an opportunity to be heard regarding the decision, reflected in the Board's Notice, that a *full* Board should participate in connection with the Court's mandate to *clarify* the Board's

original decision. This result is now a *fait accompli,* within the context of the Board's Notice, so that reference of the Court's remand to a full Board can no longer be characterized as "proposed action." Yet, in context with the Court's mandate and under all the circumstances herein, the employer submits that it *should* have been afforded an opportunity to be heard regarding the matter of the scope of Board participation. By having failed to afford all parties this opportunity, the present Board majority has further flouted and ignored the Court's mandate to the prejudice and injury of the employer.[1]

5. With respect to the merits of the above-entitled matter, the present Board majority states that it proposes to adopt "in all respects the findings, conclusions and recommendations of the Trial Examiner." We submit, however, that the reasons provided by the present Board majority for electing to follow this course are not supported by the record, which, of course, did not support the findings and conclusions of the Trial Examiner in those particulars considered relevant to the issues herein. Instead, as Member Leedom has concluded in his dissent to

1. If all of the parties had been permitted to be heard regarding the *decision* that a *full* Board panel should now participate in connection with the remand by the Court of Appeals, it is conceivable that a mutually satisfactory solution might have been reached regarding the scope of Board member participation and the proper scope of the mandate of the Court of Appeals. Thus, for much the same reasons explicated by the Board in *Town and Country,* 136 NLRB 1022, a case that might be likened in some particulars with the situation herein, it is submitted that, even if the Court of Appeals had not specifically decreed otherwise, the Board should have allowed all the parties a voice in connection with the *decision* to permit full Board participation herein.

the present Board majority's proposed action, the record amply supports the conclusion that the alleged discriminatee, Burinskas, was terminated *for cause*. The reasons in support of this conclusion, i.e., that the employer did not violate the Act in terminating Burinskas, are cogently and generally set forth in Member Leedom's dissent. These reasons, in part, and others, are found considerably amplified in the brief filed with the Board by the employer at the time exceptions were filed to the Intermediate Report of the Trial Examiner. This brief is therefore specifically adopted herein by reference and it is made a part of this Answer. Furthermore, the brief of the Board to the Court of Appeals is also specifically adopted herein by reference and it, too, is made a part of this Answer. Together, these briefs show convincingly and persuasively, we submit, that Burinskas was terminated for cause and that the weight of the evidence amply supports that conclusion. The employer urges the present Board majority to consider the content of these briefs, for they show the error of the present Board majority's reliance on the reasons set forth in the Notice herein as support for the conclusion that the Trial Examiner's findings, conclusions and recommendations be adopted *in toto*.

Wherefore, the employer prays that the Board refrain from issuing an Order setting aside its previous decision in the above-entitled matter; that the Board clarify its original decision in accordance with the mandate of the Court of Appeals; that the Board reaffirm its original decision herein and clarify such decision as suggested
6 in the dissent of Member Leedom; and, in any event, if the *full* Board is to participate in connection with the remand, that all the parties be afforded opportunity to

be heard regarding the proper scope of participation by Board members.[2]

Ferrell-Hicks Chevrolet, Inc.,
By: Karl W. Grabemann,
134 South La Salle Street,
Chicago, Illinois 60603.

Certificate of Service.

I, Karl W. Grabemann, do certify that a copy of this Answer has been mailed this date by first class mail to the entities named below, who have appeared as counsel of record for the alleged discriminatee, Andrew Burinskas:

William F. Lennon, Esq.
54 West Randolph Street
Chicago, Illinois 60601

Mozart G. Ratner, Esq.
1411 K Street, N. W.
Washington, D. C.

Robert M. Lichtman, Esq.
850 Washington Building
Washington, D. C.

Karl W. Grabemann.

Dated at Chicago, Illinois, this 8th day of September 1964.

2. The employer submits that it would be useful to the Board to allow oral argument before the Board in connection with the instant Notice and the issues raised by it. Therefore, the employer requests that the Board grant oral argument before it to the parties herein.

149 NLRB No. 130 D-6624

Chicago, Ill.

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD.
* * (Caption—13-CA-4886) * *

SUPPLEMENTAL DECISION AND ORDER.

On April 22, 1963, a majority of a Board Panel (Member Leedom and former Member Rodgers) issued a Decision and Order, 142 NLRB 154, dismissing the complaint in this proceeding on the ground that the General Counsel had failed to establish by a preponderance of the evidence that Respondent's discharge of Andrew Burinskas had violated Section 8(a)(3) and (1) of the Act. Chairman McCulloch, the third member of the panel, dissented because he agreed with the Trial Examiner that the discharge had been prompted by Respondent's animus against Burinskas' union activities.

Burinskas then petitioned the Court of Appeals for the District of Columbia Circuit for review of the Board's Order. On January 8, 1964, the Court remanded the case to the Board for reconsideration of the Decision with a view to its clarification.[1] The Court stated as its reason for the remand that it had:

> . . . difficulty in apprehending the basis for the Board's Order by reason of ambiguities in its Decision deriving from the Board's treatment of the Examiner's findings with respect to the credibility of certain witnesses for the employer and uncertainty as to the extent to which the Board rejected the Examiner's inferences drawn from the evidence found credible.

1. *Burinskas* v. *N.L.R.B.*, (C.A.D.C. No. 18454).

The Court further directed the Board to give all parties full opportunity to be heard upon any action it proposed to take as a result of the remand. Pursuant to this direction, the Board served on all parties a Notice to Show Cause, dated July 28, 1964, why it should not issue an Order setting aside its previous Order and adopting in all respects
2 the findings, conclusions, and recommendations of the Trial Examiner. The action proposed to be taken pursuant to the Court's remand for reconsideration of the Decision with a view to its clarification was grounded on the following considerations, as set out in the Notice:

> As the board Panel which originally considered this matter cannot be reconstituted, the questions presented by the Court's remand have been considered by the full Board. A majority of the Board is now of the opinion that in accepting the Trial Examiner's resolutions of credibility based on the demeanor of the witnesses it should also have accepted the inferences which the Trial Examiner drew from the facts as he found them. The Trial Examiner discredited the testimony of Respondent's witnesses, Haggerty and Frachalla, as to their asserted reasons for discharging Burinskas. No credible reason for his discharge having been established, it follows that the inferences drawn by the Trial Examiner from the credited testimony of Burinskas are entitled to great weight. The contrary inferences drawn by the majority members of the Board Panel were based in part on an acceptance of discredited testimony, and for that reason are less supportable than the inferences of the Trial Examiner.

The Notice to Show Cause was signed by Chairman McCulloch and Members Fanning and Brown. Member Leedom dissented because (1) he considered it improper for the Board, in this posture of the case, to reverse on its own motion its original decision finding that Respondent

had not violated the Act; and (2) on the merits, he found that Burinskas had in fact been discharged for good cause.[2]

The Employer, Ferrell-Hicks Chevrolet, Inc., thereupon responded to our Notice to Show Cause. It urges, in accord with Member Leedom's dissent to the Notice, summarized above, that the Board's proposal to reverse its original decision is improper because it exceeds the scope of the
3 Court's remand; that the present Board majority is estopped from issuing its proposed Order because it is at odds with its own brief to the Court in which it urged affirmance of the original decision to dismiss the complaint, and with the position taken in oral argument before the Court that the Board should be permitted to clarify its Decision; that the remand does not require full Board participation, and that Member Leedom, as the sole remaining member of the majority in the original decision, could and should alone clarify that decision; that the Court's mandate required the Board to afford the parties the opportunity to participate in the decision making process, including the right to be heard on whether this matter should have been considered by the full Board; and finally, on the merits, that Burinskas was terminated for nondiscriminatory reasons.

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2. Member Leedom would resolve the ambiguities in the original Decision with respect to the Board's treatment of the Examiner's findings as to the credibility of certain employer witnesses, with which the Court had difficulties, as follows: In accepting the Trial Examiner's resolutions based on credibility but nonetheless reversing his violation finding, the Board intended, in its original Decision, only to accept the Trial Examiner's credibility resolutions of testimonial conflicts as to the underlying facts, without accepting his rejection on grounds of credibility of the testimony of employer's witnesses as to their subjective reasons for discharging Burinskas, or his conclusionary finding that the discharge had been for discriminatory reasons.

Respondent's Answer, and Member Leedom's dissent to the Notice, raise the question of what the Court intended the scope of its remand to be. We regard the remand as encompassing a full reconsideration of our original Decision. The Court, it seems to us, was not simply seeking an explanation of how we could justify our rejection of some credibility findings made by the Trial Examiner and yet adopt others; rather, the Court's concern was more fundamental, namely, why we had come to the conclusion we reached in the face of the Trial Examiner's resolutions of credibility. The answer to this question is given by the present Board majority in the paragraph quoted above from the Notice to Show Cause. We incorporate it in this Supplemental Decision and Order.

Moreover, even if Respondent be correct in its view that the scope of the remand was limited to a clarification of our former holding, we believe the Board may nevertheless conclude, after re-examining the basis for its former decision, that it was wrong then, and that the policies of the Act justify and require rectification of its error.[3]

4 As for Respondent's contention relating to participation by the full Board rather than by panel, we think it apparent that the Board, as a continuing body, is empowered to consider and reconsider, at appropriate times, all matters coming before it, with such participation therein as it may decide for itself. No party to a Board proceeding has a right to complain as to the Board's own internal procedure for determining who shall participate in judging his case, particularly where, as here, the Board's decision has been joined in by a majority of the full Board. With respect to Respondent's further contention that the only remaining

3. *American Federation of Television and Radio Artists, AFL-CIO,* 135 NLRB 297, and 133 NLRB 1736.

member of the former panel majority should alone consider this remand, the short answer is that the Board, under Section 3(b), is only empowered to act through a majority of the Board, except when it has delegated authority to a panel of three and then only by a majority of that panel.

Other contentions urged by Respondent not specifically answered above have nevertheless been considerd and are found to be without merit. We also deny its request for oral argument as the issues and positions of the parties have been ably expounded in the papers before the Board.

For the foregoing reasons, we hereby set aside our previous Decision and Order in this proceeding, 142 NLRB 154, and hereby adopt the Trial Examiner's findings, conclusions, and recommendation as modified below.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that Ferrell-Hicks Chevrolet, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following modifications:

1. Add the following as paragraph 2(b), and renumber the following paragraphs of Section 2 accordingly:

> (b) Notify Andrew Burinskas, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

2. Immediately above the double line in the Appendix[4] attached to the Intermediate Report, insert the following:

Note: We will notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C. Dec. 9, 1964.

Frank W. McCulloch,
Chairman,

John H. Fanning,
Member.

Gerald A. Brown,
Member,

(Seal)

National Labor Relations Board.

4. The address of the Thirteenth Regional Office stated in the Appendix attached to the Trial Examiner's Intermediate Report is amended to read: 881 U. S. Courthouse and Federal Office Bldg., 219 S. Dearborn St., Chicago, Illinois 60604, Telephone Number 828-7572.

1 UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

Ferrell-Hicks Chevrolet, Inc., *Petitioner.* vs. National Labor Relations Board, *Respondent.*	No. 19,222

PREHEARING CONFERENCE STIPULATION.

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

Pursuant to Rule 38(k) of the Rules of this Court, the parties in the above-captioned proceeding, subject to the approval of the Court, hereby stipulate and agree as follows:

I. The Issues.

1. Whether the mandate of this Court on remand permitted the Board to set aside its original decision and order dismissing the complaint and to issue a supplemental decision and order finding a violation of Section 8(a)(3) and (1) of the Act.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employee Andrew Burinskas.

2 3. Petitioner believes that a third issue is whether the Board's remedy is appropriate if the Court determines that the Board's supplemental decision and order should be enforced. The Board disagrees.

II. The Joint Appendix.

1. The Board believes, but petitioner disagrees, that the joint appendix and briefs in *Burinskas* v. *NLRB*, #18,054, are properly part of the record for review. Accordingly, the Board will lodge six copies of each document with the Clerk of the Court. However, the parties agree that, in order to save printing costs, the joint appendix in #18,054 shall be considered a portion of the joint appendix in this case and may be referred to by the parties in the briefs herein.

2. The additional portions of the record to be printed shall be embodied in a joint appendix. The petitioner will serve its designation of the portions of the record which it wishes to appear in the joint appendix with its opening brief. The Board will serve its designation of the portions of the record which it wishes to appear in the joint appendix with its answering brief. The printed joint appendix will be filed in this Court and served on the date for the filing of the petitioner's reply brief.

3. Each party will bear the expense of printing in the joint appendix the portions of the record it designates. The printing of the joint appendix will be the responsibility of the petitioner; provided, however that the desig-

3 nations are properly served.

III. The Briefs.

In lieu of filing and serving printed briefs on the dates prescribed by Rule 18, each party may file and serve a typewritten copy of its brief on that date, with printed copies to be filed and served on the date the petitioner's reply brief is due.

Karl W. Grabemann,
Counsel for Petitioner.

Dated at this 5th day of April, 1965.

Marcel Mallet-Prevost,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 6th day of April, 1965.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

No. 19,222 September Term, 1964

Ferrell-Hicks Chevrolet, Inc.

v.

National Labor Relations Board.

Before: Washington, Circuit Judge, in Chambers.

ORDER.

The parties in the above-entitled case having submitted a stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

Ordered that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation shall be printed in the joint appendix herein, and it is

Further Ordered that the joint appendix in *Burinskas* v. *National Labor Relations Board,* No. 18,054, shall be treated as part of the joint appendix herein.

The parties may file their briefs in typewritten form, provided that the briefs and joint appendix of the parties are filed in printed form not later than the date on which petitioner's reply brief is due.

Dated: Apr. 8, 1965.

6 TRANSCRIPT OF PROCEEDINGS.

ANDREW V. BURINSKAS, was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination.

Q. (By Mr. McCabe.) Are you also known by another name, Mr. Burinskas? A. Also known as Andy Burns for business conveniences. A-n-d-y B-u-r-n-s.

7 Q. What is your occupation? A. Automobile salesman.

Q. Were you formerly employed at Ferrell-Hicks Chevrolet? A. Yes, I was.

Q. When were you employed there? A. From September, 1955 through May 10, 1962.

Q. And what was your job at Ferrell-Hicks? A. Automobile salesman, new and used cars, trucks and so forth.

Q. Are you familiar with a term known as the 200 Club or the Hall of Honor Club? A. Yes, sir. I was a member.

Q. Will you tell us what that is? A. I was a member of the 200 Club. This is also called a Hall of Honor Club. Chevrolet has what they call a 100 Car Club, a quota for each dealership or sales potential is set by the Chevrolet Division, and for so many cars sold you join the 100 Car Club and if you excel and you double that amount, it's called a 200 Car Club or the Hall of Honor Club. That would be two points for a new car, one point for a used car, two points for a truck, and one point for a used truck.

Q. During what period of time would you need to sell

this many? A. One year. This is a one-year term in which you acquire so many points, and it's 450
8 points for the Hall of Honor.

Q. You said you were a member of this club when?

A. I was a member the last four years.

Q. That would be what years? A. '58 through '62.

Q. To '62? A. No, '61. '58 through '61 inclusive.

Trial Examiner: Is that computed on the calendar year or on your service year or what?

The Witness: Calendar year.

Q. (By Mr. McCabe.) How many salesmen were generally employed by Ferrell-Hicks? A. From 16 to 20, 21.

Q. And how many of those, if you know, were members of this club during the year 1961 for the year 1961? A. Two.

Q. Would you give us their names or do you know?

A. Mr. Keith Lais, K-e-i-t-h L-a-i-s, and myself.

Q. During the year 1960, how many were members of that club, if you know? A. There was Mr. Keith Lais, Herbert Harrison, which acquired his points before he came to Ferrell-Hicks Chevrolet, myself. I believe it was Ferdinand Gilmore, G-i-l-m-o-r-e.

9 Q. Now, during the year 1962, you said you worked until May the 10th, I believe? A. Yes, sir.

Q. Do you know how many cars you sold during that period of time? A. Current year?

Q. During 1962. From January 1st through May 10th. A. The exact amount I do not remember but it would average about 20 cars a month. It averaged about 20 cars a month. It was 112 or something like that.

Trial Examiner: What do you mean 112? Points?

The Witness: Cars, units.

Trial Examiner: New or used cars or both?

The Witness: Both, units.

Q. (By Mr. McCabe.) Would these have been mostly new cars or mostly—? A. Mostly new cars, yes.

Q. Your principal sales was new cars, is that right? A. Yes, sir.

Q. Are you a member of the automobile salesmen's Union of Chicago & Vicinity? A. Yes, sir. I am.

Q. When did you become a member of this organization? A. July, 1961.

Q. And do you hold any position with this organi-
10 zation? A. Yes, sir. I am chairman of the Organizing Committee.

Q. And beginning in July when you—? Strike that. When did you become chairman of the Organizing Committee? A. In July of 1961.

Q. What do you do as chairman of the Organizing Committee beginning July, 1961? A. Well, we solicited membership—membership into the Union and took care of all business activities as far as the Union was concerned, petitioned for elections.

Q. Whom did you solicit for membership? A. Automobile salesmen.

Q. At what dealers? A. Well, almost—. Quite a few dealerships in the Chicago area. You want me to be specific in a few?

Q. Yes, name some. A. Well, we had Ferrell-Hicks Chevrolet, of course .

Q. You solicited automobile salesmen at Ferrell-Hicks for membership in this Union? A. Yes, sir. Superior Chevrolet; Caley Chevrolet; Fencl-Bogan Chevrolet, Inc.; Oak Park Motors, Inc.; Elmwood Ford Motors, Inc. Quite a few.

Q. With respect to Ferrell-Hicks Chevrolet, what did you do, if anything, after you had solicited member-
11 ship for this organization? A. Well, we petitioned at the Labor Board for an election to be held at Ferrell-Hicks Chevrolet.

Q. When you say "we petitioned," who are you talking about? A. Mainly I petitioned for an election.

Q. You filed petitions? A. Yes, sir.

Q. On behalf of whom? A. On behalf of the Automobile Salesmen's Union of Chicago & Vicinity.

Q. Who signed the petition? A. I did.

Q. You signed it. Then, what, if anything, happened after you petitioned for an election? A. Well, Labor Board hearings were held here and the Government ordered an election to be held at Ferrell-Hicks Chevrolet.

Q. Do you recall approximately when that hearing was held? A. The month of July, 1961.

Q. Pardon me. Do you recall when the hearing was held? A. The hearings were held September.

Q. Approximately what date? A. September 12th or through there. I don't remember the exact date. On or about September, the first week.

12 Q. What, if anything, did you do in respect to those hearings? A. I was actively participating in them, sitting in on the—at the hearings right here.

Q. You sat in on the hearings. Did you do anything else? A. Well, I participated in all action that was going on as far as the hearings were concerned, testifying on behalf of the salesmen.

Q. You testified—appeared as a witness? A. Yes, sir.

Q. Then, what, if anything, happened as a result of these hearings? A. After the hearings were concluded, the Labor Board ordered an election to be held at Ferrell-Hicks Chevrolet.

Q. You stated that you also solicited membership at other dealers? A. Yes, sir. I did.

Q. And did you file petitions in regard to these dealers, too? A. Yes, sir.

Q. When this hearing was held, was it a hearing for

Ferrell-Hicks Chevrolet only ? A. No, sir. We had quite a few dealerships, and the first five were consolidated
13 for hearing purposes and then, we had separated groups but we had quite a few.

Q. Were there any hearings consolidated with Ferrell-Hicks? A. Yes, sir. There was five.

Q. What were those? A. Ferrell-Hicks Chevrolet; Superior Chevrolet; Caley Brothers Chevrolet, Inc., Hoeffell-Goy Ford; and Hendrickson Pontiac.

Q. And did you participate in all of these hearings? A. Yes, sir. I did.

Q. In the same manner that you did for Ferrell-Hicks? A. Yes, sir.

Q. You stated that an election was directed for Ferrell-Hicks. On what date do you recall? A. The election was held December 20, 1961.

Q. Were there hearings held at any of these other places that you named, these other four? A. Yes, sir. They were held right here.

Q. And what date were they held? A. The hearings or the election?

Q. The election. I'm sorry. A. Well, the first of the group of five, the elections were held December 20th, all in one day.

14 Q. All of these five you mentioned were held on December 20th, the election? A. Yes, sir. I was present at all these places for the election, for the vote itself, casting of the ballots.

Q. Now, preceding the election at Ferrell-Hicks, what, if anything, did you do in preparation for the election? A. We held meetings, passed out literature asking salesmen to vote for the Union, not against it.

Q. This literature, did it indicate who it was prepared by? A. Yes, sir. I had my signature on all this literature.

Q. How did you sign? A. Andy Burns, as chairman of the Organizing Committee.

Q. For whom? A. For the Automobile Salesmen's Union of Chicago & Vicinity.

Q. Prior to the selection, did you have any conversation with Mr.—. Strike that. Who is Burt Ferrell? Do you know him? A. Mr. Burt Ferrell is the principal owner of Ferrell-Hicks Chevrolet, Inc., president.

Q. Is he active in the operation of the business?
15 A. Yes, sir. Very active.

Q. Prior to the election, did you have any conversation with him with respect to the Union? A. Yes, sir. From time to time we had conversation with Mr. Ferrell.

Q. Do you recall any comments he may have made within a day or two of the election? A. Yes, sir. Mr. Ferrell called me in his office, said, "Sit down." We started talking and the main thing that was discussed—he said to me —Mr. Ferrell told me—he says, "Andy," he says, "why did you get started in this Union deal? If you would have come to me and talked to me about it, I would have helped you."

Q. Now, when did this conversation take place? A. Just before the election, I'd say. On or about a week or ten days before the election.

Q. Was anyone else present in this—when you had this conversation? A. In his office? No, sir. There was just Mr. Ferrell and I.

Q. What, if anything else, was said? Did you say anything? A. This talk lasted about fifteen minutes. I don't recall exactly what else was said.

Q. Did you say anything? Did you answer that
16 question? A. Oh, yes. That question was answered by me to this extent: I said, "Mr. Ferrell, if I would have come to you and asked you or told you the boys wanted a union, you would have fired me and you know you would have" and he says—. Beg pardon?

Trial Examiner: What did he say?

The Witness: Then, he replied—he says, "I would never fire you." He says, "You're too good a productive man. We'd never fire you." I said, "Mr. Ferrell, as far as productive men go," I says, "I don't believe you know what each man sells or how many cars he sells." That's about all that I remember.

Q. Did you have any other conversation with him about the Union or did you hear him make any comments about the Union near the time of the election? A. Yes, sir. It was at the time we had received from the Labor Relations Board the election notices to be posted at the dealerships in convenient places. I went up to Mr. Ferrell and asked him how come these notices weren't posted, which was a day late. He said that he just received them this morning and they're laying on his desk and he didn't care if I took them and posted them, so I went in his office and took these election notices to be held, went over to the switchboard—we have a glass partition from the switchboard operator sits—and I scotchtaped this election notice on this glass. As I was doing this, Mr. Ferrell came by and looked at me. I was going to go across the street in the used car building and post the other notices. Mr. Ferrell came by and he says—looked at me and he says, "No son-of-a-bitch is going to tell me how to run my business' and he went by me. With that I turned around and raised my hand to my ear and I said, "What did you say, Mr. Ferrell?" He looked at me and repeated it again. He says, "I mean no son-of-a-bitch is going to tell me how to run my business." With that I looked at him kind of funny and crossed over to the other side of the car and then across the street.

17

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Q. (By Mr. McCabe.) You say you had a Christmas party in 1961? A. Yes, sir.

27

Q. When did you learn that there would be a Christmas party? A. Oh, it was just about a month before it actually happened. Maybe three weeks before it happened.

Q. How did you learn about it? A. Like the usual things. Most things were mentioned at sales meetings when a majority of them were just on the floor in the showroom. This particular one was at a sales meeting.

Q. Did you have any conversation with Mr. Ferrell with respect to the Christmas party at any time prior to the date of the party?

28 Q. When was this? A. On or about—. The 15th or 16th, Friday or Saturday before the party.

Trial Examiner: December?

The Witness: Yes, sir, 1961. I was going by Mr. Ferrell's office and the managers were in. I believe Mr. Haggerty, Joim Watson, and I heard a discussion going on to the effect of a party being held, and the discussion went on as to what day it would be held and I went by, Mr. Ferrell called me in and he say, "Andy, we are going to have a party Tuesday." Mr. Haggerty was there, also.

Q. This would be Tuesday after the 15th or 16th that you already testified to? A. Yes, sir. The election was the 20th, Wednesday; Tuesday, would be the 19th. It was—. He said the party would be held on Tuesday the 19th of December, 1961. I said, "Mr. Ferrell, you cannot hold this party this close to the election." I says, "There's a ruling which I have learned pertaining to 24 hours before election time when you cannot throw this party. Why does it have to be so close to election time"? He says, "Well, I'll find out about that." I said, "Well, object and I want you to know I don't want you to have this party on Tuesday so close to the election." That was the 19th. So he says,

29 "Well, I'll check and" I stepped out and he grabbed a phone and I don't know who he called but he made the phone call as I left the office.

Q. And did you have a later conversation with him? A. Yes, sir. That same day just a few minutes later. I come by again, and he says, "Andy, you were right." He says, "We are going to have the party Monday, if I could get this date." I said, "Well, I understand we are going to—." I understand we are going to have this party at Mangam's Chateau." I says, "The place is fine and ideal. The men enjoy that but why would it have to be on a Monday? Why can't we have it Saturday or Friday or so before that?" He says, "Well, I think the men will enjoy it on a Monday." I said, "Well, that's up to you. You're throwing the party." and I walked out—out of the office.

Q. And then, when did you have the party? A. The party was held Monday just before election time. Monday we had the party.

Q. You say just before the election time. Do you know what day of the month Monday was? A. Monday, the 18th of December.

Mr. Grabemann: Objection.

The Witness: Nineteenth.

Mr. Grabemann: Once again, Mr. Trial Examiner, I move that this line of questioning with reference to party be stricken because I don't think it has any relevance or materiality to the issues in this case.

Trial Examiner: Well, I think it may throw some light on some background light on the final termination of this man's services. I assume that's why it's offered. There's no 8 (a)(1) allegation in the complaint, so I assume all this evidence is offered as background evidence to show his activities and may be received for that purpose.

* * * * *

Q. Now, you testified that the election was held at Ferrell-Hicks on December the 20th? A. Yes, sir.

Trial Examiner: I didn't hear that last statement, last question.

Mr. McCabe: The election was held on December 20, 1961.

Q. (By Mr. McCabe.) What was the results of that election? A. Are you referring to all five places or at Ferrell-Hicks?

Q. At Ferrell-Hicks. A. At Ferrell-Hicks we lost twelve to six.

Q. Did you have any conversation with Mr. Ferrell after the election at any time about the Union? A. Yes, sir. The next morning after the tally was in I came to work and Mr. Ferrell was standing by the door entrance to his office and I stopped and we started talking, Mr. Ferrell and I, and—

Q. What did he say, if anything, and what did you say, if anything? A. He says to me, "Well, Andy, what do you think?" I says, "Well, Mr. Ferrell, I—to tell you the truth I'm hurt, really hurt that we lost this election here," and I was hurt due to the fact the things went on as far as elections are concerned.

Mr. Grabemann: Ojection, Mr. Trial Examiner. I move that that remark be stricken.

Trial Examiner: Yes, the last remark may be stricken.

Q. (By Mr. McCabe.) Just tell us the conversation. A. The conversation pertained—. He's saying to me, "Well, Andy, it's all over with, forget it. I told the boys not to tease you, not to horseplay with you. Just go back to work now. You go ahead and go back to work now." I said, "Well, Mr. Ferrell, I tell you, you know I'm really hurt" and he says, "Yes, I imagine you are but remember this: You only have—the only friends that you have are your mother and father, and outside of those you couldn't put them on one hand." I said, "Well, that's beside the point, Mr. Ferrell. It wasn't my friends beat me. It was

your money that beat me." With that I—this conversation dropped and I went off and left him and went to my desk.

Q. Now, you testified, I believe, that the elections
34 were held at four other places on December 20th? A. Yes, sir.

Q. And after the election at these five places, what, if anything, did you do? A. Well, we drafted a letter and I mailed to the members of the Union a tally of the election held at these five places, the result and tabulation of the—counted them, drawn up, drafted them, mimeographed and mailed to every member, also passed some out personally at Ferrell-Hicks Chevrolet so everybody would know I had mailed these results of the election, and it was mimeographed for entitled "Keep the Ball Rolling."

Q. Why did you prepare this? A. Why did I prepare this?

Q. Why did you have it prepared? I believe you said you had it prepared? A. Well, we had more elections coming up and I wanted to encourage the men to the fact that we did win two of these elections and we had more coming up and I wanted to win everyone of them.

Q. Was this bill which was prepared, "Keep the Ball Rolling," was that signed by anyone? A. Yes, it was signed by me as chairman of the Organizing Committee for the Automobile Salesman's Union of Chicago & Vicinity.

35 Q. And what name did you use on that? A. Andy Burns.

Mr. McCabe: May I have this marked as General C Counsel's Exhibit No. 3 for identification?

(The document aboved-referred to as General Counsel's Exhibit No. 3 was marked for identification.)

Q. (By Mr. McCabe.) I show you what has been marked General Counsel's Exhibit No. 3 for identification and ask you if you know what this is? A. Yes, sir. I do.

Q. Look at it. What is that? A. Well, this is titled "Keep the Ball Rolling" and it explains the election results.

Mr. Grabemann: Objection, Mr. Examiner, I move the last response of the witness be stricken. The document obviously speaks for itself.

Trial Examiner: Well, that's offered. I don't see any harm in his describing it briefly. Don't read from it, but in general what was it. You already testified what it was. It was a circular you prepared for circulation among employees at the various shops.

The Witness: Yes, sir.

Trial Examiner: Is that right?

36 The Witness: Yes, sir.

Q. (By Mr. McCabe.) And this is a two-page bill, and on the second page is there your signature? A. Yes, sir. It is. Andy Burns.

Mr. McCabe: I offer into evidence General Counsel's Exhibit No. 3.

Trial Examiner: Any objection?

Mr. Grabemann: We object to its introduction, Mr. Trial Examiner. It has no relevance or materiality to the issues in this case.

Mr. McCabe: It certainly goes to labor organization, Mr. Examiner. Labor organization is an issue in this case.

Trial Examiner: It may be received.

(The document above-referred to, heretofore marked GENERAL COUNSEL'S EXHIBIT NO. 3, was received in evidence.)

Mr. Lennon: Mr. Examiner, may I make a remark about that document, also, as to its relevance?

Trial Examiner: Well, I have admitted it.

Mr. Lennon: Okay.

Q. (By Mr. McCabe.) Following the election, did you

have any conversation with Mr. Haggerty with regard to the Union? A. Yes, sir. We did, or I did.

37 Q. Did you say you did? A. Yes, sir. I did.

Q. When did you have such a conversation? A. We had many conversations. You mean directly after the election?

Q. Yes. Within a few days after the election. A. Again Mr. Haggerty says, "Come on in the office and sit down" and which I did, which was about two days or three days after the election, which would be about December 22nd or 25th, and Mr. Haggerty said to me—. I take it back. It was the day after the election or the second day. He says to me, "Andy, I thought you were through."

Trial Examiner: He thought you were what?

The Witness: "You were through with the Union." I says, "Jack, let's wait and see before I say I'm through. Let's wait and see the results of the elections to be held yet. Then we'll know if I'm through or not."

Q. (By Mr. McCabe.) And what elections did you have to be held at that time yet? A. We had another six elections to be held from six different dealerships.

Q. Approximately when were these elections to be held? A. There was five more, a group of five more to be held on the 28th of December, 1961.

* * * * *

41 Q. (By Mr. McCabe.) Now, following this series of elections at which the Union won at four elections, what, if anything, did the Union do in regard to these wins? A. After the elections were over, we had meetings.

Q. Who had meetings? A. Automobile Salesmen's Union of Chicago, in which—.

Q. Who attended these meetings? A. The salemen of all these dealerships that won the election.

Q. And what was the purpose of these meetings? A. The purpose of the meetings was to nominate and election

negotiating committee and stewards from each individual dealership, which they were nominated and elected. Then, we went ahead and drafted our wage proposals for the negotiations to be held between the Automobile Salesmen's Union of Chicago & Vicinity and individual automobile agencies.

* * * * *

43 Q. (By Mr. McCabe.) Did you pass them out at any place other than the four dealers involved? A. Yes, sir. We mailed quite a few of these. Not quite a few. As many as we had memberships and also went around to these dealers in person to hand some out, and each dealership, also at Ferrell-Hicks Chevrolet. I let the boys know just what our intentions are as far as working hours and conditions were.

Trial Examiner: When you say the boys, who were the boys?

The Witness: The salesmen, sir. I'm sorry.

* * * * *

51 Q. (By Mr. McCabe.) Did you have a conversation with him about the Union two days before you were discharged? A. Yes, sir.

Q. Did you have one three days before you were discharged? A. The times in which we did have conversations were always brought by his inviting me in. The exact date and times, as far as one day or two days
52 before that, I didn't make—I didn't know of it at the time. I didn't make any notes on it or nothing. I can't remember exactly what was said at that time, but there were other conversations which I do remember, a few more things, but that second day I don't remember.

Trial Examiner: Well, take a period of about a week before you were terminated. Give us as closely as you can how long or when during that week they occurred; and if you don't remember the exact day, say so; but as

long as it occurred within, say, a week before your termination, give us the complete conversations you had with him as you recall it concerning the Union in which the Union was mentioned, if it was mentioned.

The Witness: Oh, yes. Mr. Haggerty said to me how was the Union going, what's going on. I said, "Well, Jack, we are trying to negotiate a contract for the men at these respective places and all they keep doing is singing one song. 'The lawyer's going to take care of it all.' They're not talking, they're not even setting up a time and place" and I said, "The Government's going to start looking into this. We're just not getting anywhere with these respective places or their attorney."

Mr. Grabemann: Now, when did this take place?

The Witness: About a full week, maybe ten days before I was discharged, on or about there.

53 Q. (By Mr. McCabe.) Where did this take place?
A. In Mr. Haggerty's office.

* * * * *

56 Q. What, if anything, happened on May 10, 1962?
A. May 10, 1962 I was working a deal with the customer—a customer of mine had a service problem which I was running back and forth from the showroom. Mr. Tom Frachalla, F-r-a-c-h-a-l-l-a, said "Andy, come into
57 the office" and "we want to talk to you." Mr. Haggerty was standing right there, too.

Q. What time of day was this? A. This was about six o'clock in the evening, and I says, "Tom excuse me for a minute. When I get through with my customer, I will see you when I finished with this customer." I said, "What do you want, Tom?" He says, "Come on in this back office," which we refer to as Mr. Jim Watson's office. Mr. Tom Frachalla was in this office; Mr. Jack Haggerty was in this office; and I.

Q. Anyone else? A. No, sir. No one else. The three of us.

Q. What, if anything, was said by you or by Frachalla or by Haggerty? A. Mr. Tom Franchalla sat in the corner, scratched his head, he says, "Andy, I don't know where to begin this or how to begin this." I says, "What's the matter?" He said, "I understand you made a statement about me to Jack Haggerty." I said so and then Tom went on, he says, "Do you remember when I came back to work here we went to appraise those two Cadillacs and a used car for you at the gas station?" I said, "Yes." "At that time, you made a statement to me about Jack Haggerty." I says, "Yes." I said, "Well, what's this all about," and they were stumbling around. I says, "Does
58 this mean—."

Mr. Grabemann: Objection. Objection, Mr. Examiner, to the characterization stumbling.

Trial Examiner: It may be stricken.

The Witness: I'm sorry. Anyways, grasping for words—

Mr. Grabemann: Objection, Mr. Examiner. I move that be stricken.

Mr. Lemmon: Mr. Examiner, we would have no objection that the witness be instructed to merely say what he saw and what he heard.

Trial Examiner: Just give us the conversation, and what you said.

The Witness: Then, I said to Tom, I says, "So what?" He says—. Then Jack—Mr. Haggerty took over and he says—. Before that I says, "Does this mean I'm fired" and he says, "Yes."

Q. (By Mr. McCabe.) Who said that? A. Mr. Jack Haggerty said, "Yes, you are fired." I said, "As of when?" He says, "As of now." I says, "All right. I'll get my things out of my desk drawer and I'll leave."

Oh, before I said that I says, "Well, Tom," I says, "You've always made statements about other people, about occurrences. How come now all of a sudden
59 it all reflects on me?"

Mr. Grabemann: Excuse me. I didn't hear that last statement.

(Whereupon last sentence of answer was read as follows):

"How come now all of a sudden it reflects on me?"

Trial Examiner: Go ahead. Was there anything else that was said at that time?

The Witness: Not that I remember.

Q. (By Mr. McCabe.) Did he answer the question, your question? A. No, sir. He didn't answer that. Then, I asked him—preceding this, when this gets started, I asked him a few other questions. I asked Tom, I says, "Well, Tom, was there anything wrong with my work as far as sales, honesty, integrity?" I didn't use the word "integrity but I used—. "Is there anything wrong with my job here as a salesman?" He says, "No, Andy," he says, "if I had my own place, I would want a man like you. I think you're a wonderful salesman. I wish we had more of them, but that isn't it." That's about all I remember in that conversation.

* * * * *

60 Q. (By Mr. McCabe.) Did Frachalla, in this conversation, tell you what it was that you had said about him? A. Yes. He mentioned the fact that same day I had said something about Tom to Mr. Haggerty.

Q. Did he say what it was that you had said? A. Yes. He says that I had made a statement pertaining to a deal in which Mr. Frachalla had sold—and I'm supposed to have said to Mr. Haggerty "I suppose Mr. Frachalla knows all about this," but he didn't use the wording. He says I made a statement against him to Mr. Haggerty.

Q. Now, I am asking for his exact words. What did he say in regard to this statement? Did he say what the statement was or did you just say, "Yes, Tom, that's right. I made a statement?" A. No. He just said, "You made a statement against me to Mr. Haggerty.

Q. He didn't say what it was? A. No, sir.

Q. Did you have any discussion during this conversation as to what you said about Mr. Haggerty or about Mr. Frachalla to Mr. Haggerty? A. No, sir.

Q. You agreed with him that you had made a
61 statement? A. Yes, sir.

Q. You had, in fact, made a statement, is that right? A. Yes.

Q. When had you made this statement? A. A couple hours before I was discharged?

Q. That same day? A. May I ask is May 10th Thursday or Wednesday?

Mr. McCabe: I think—. It is Thursday.

Mr. Grabemann: I will stipulate that May 10th was a Thursday.

The Witness: All right. Thursday. The statement that I made was made May 10th about 7 o'clock in the evening.

Q. (By Mr. McCabe.) Was made May 10th, on Thursday? A. On Wednesday, the day before my discharge of May 10th.

Q. It was made on May 9th? A. May 9th, rather, Wednesday.

* * * * *

71 Q. (By Mr. Lennon.) Now, is this 200 Car Club sponsored by Ferrell-Hicks or by the Chevrolet Motor Company? A. It's sponsored by Chevrolet Division of General Motors.

Q. So, the prize you received, then, was from Chevrolet? A. Yes, sir.

Q. During the course of your employment since September, 1955 to date, have you received any other prizes or won any contests other than the 200 Car Club? A. Yes, sir. I have won the award for the 200 Car Club 4 years in a row. There were other contests in which I received more prizes, such as May and June. They do have contests.

Q. Now, referring specifically to contests sponsored by Ferrell-Hicks. A. Ferrell-Hicks. They have had individual contests from time to time and I have taken more than my share of them.

Q. What prizes, if any, have you received?

Mr. Grabemann: Objection. I move the last response of the witness be stricken.

Mr. Lennon: I concur.

Q. (By Mr. Lennon.) What prizes specifically have you won as a consequence of the contests or arrange-
72 ments been made by Ferrel-Hicks?

Mr. Grabemann: Objection, Mr. Trial Examiner. Need we got into all this? I think that certainly at this point this would become somewhat irrelevant and immaterial.

Trial Examiner: Objection overruled.

The Witness: Well, they have had contests in which—the one I remember mostly about would be the time Ferrell-Hicks run a bazaar deal in which the men participated according to number of cars sold. There was a carnival deal, bazaar in which prizes were offered, and for each car sold you have a turn of one of those wheels like at carnivals and there would be a party at the Midway House on Cicero and—by the airport, around 54th and Cicero and each—for each car sold you had so many chances on this wheel and this wheel had numbers on it and it had certain prizes laid out according to the tickets of what you would get, and we had participated in that. I did also.

Q. (By Mr. Lennon.) Have you won any other con-

tests either sponsored by Ferrell-Hicks or Chevrolet Motor other than this 200 Car Club? A. Yes, sir. Every year there's a May and June contest, and three years ago it was a point system and for so many points you could look in this catalogue and you would receive a certain prize,
73 and from that I received a real nice gift. It was an alarm saw, one of the cabinnet maker's saws which was given to me. This was strictly Chevrolet, though. They're very nice gifts, and it was worth a lot of money.

Q. Could you name any other prizes that you have won?

Mr. Graham: Objection, Mr. Examiner.

Trial Examiner: Overruled.

The Witness: I have won another television set beside this one. I have won an attache case with a movie camera inside of it, a pair of binoculars, a beautiful silver book-ends, the following year a silver ashtray designating the Hall of Honor Club. It was a matching year-to-year deal, a few more that I don't recollect right now.

Q. Referring to this Christmas party that was held therein bonus checks were passed out, do you know who received the largest bonus check?

Trial Examiner: You can answer that yes or no.

The Witness: He asked if I knew who.

Trial Examiner: Yes. And you can answer yes or no. Do you know who?

The Witness: I believe it was Mr. Lais was first and I got the second highest.

74 Mr. Lennon: I move to strike the second—.

Q. (By Mr. Lennon.) Who won the second highest check? A. I did.

Trial Examiner: He said he did.

Mr. Lennon: I was wondering if counsel was going to move to strike the answer. I was going to protect myself on the record.

Q. (By Mr. Lennon.) Now, you have testified as to several conversations that you have had with Mr. Haggerty. Have you told us all that you can recall of these conversations? A. No, sir. There was one more that took place by a drinking fountain which was adjoining Mr. Haggerty's office.

Trial Examiner: Fix the time as close as you can, the date.

The Witness: The early part of February, first week—first week of February.

Trial Examiner: Sixty-two?

The Witness: Yes, sir. Sixty-two.

Q. (By Mr. Lennon.) Let me ask you something. Did this conversation occur after you had handed out the wage proposals to the employees at Ferrell-Hicks? A. Yes, sir.

75 Q. Will you tell us more of this conversation? You say it occurred around the drinking fountain? A. I went over to the fountain to get a drink of water and this fountain is situated right in the corner by the entrance to Mr. Haggerty's office.

Q. Tell us about what time of day it was, if you recall? A. It was in the morning about 10, 10:30.

Q. Tell us what you said and what he said, if anything? A. It was more or less the same question that was put to me once before, and he says, "Andy, I thought you were through" or "are you through with the Union" and I replied, "Jack, how could I be through with the Union after all these salesmen from places in which we won elections, lost elections, and places where we didn't even file yet for an election to be held are all calling my home and asking me to keep it up, not to quit, don't get disgusted, and stay with it." And that's about all that comes back in my mind.

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109 Q. Now, you were present at the sales meeting that
110 was held on Wednesday? A. Yes, sir.

Q. And who else was present at that sales meeting apart from yourself? A. All the salesmen except the ones that have a day off.

Q. And who had a day off at that point, do you remember? A. All I know it's three men that are off. Exact men that were off that day I do not know. It's impossible to know.

Q. Now, how long did that sales meeting last? A. About 45 minutes to an hour.

Q. And did anyone conduct the sales meeting? A. Mr. Jack Haggerty.

Q. Mr. Haggerty was conducting the meeting, is that right? A. Yes, sir.

Q. What did he say, if anything, with reference to Frachalla's sale of a car earlier in the week? A. Mr. Haggerty started covering the idea of the salesmen covering the floor. By covering the floor, I'm referring to when a customer walks in the front door, he wants a salesman to jump right up at him and take care of him, and
111 Mr. Haggerty started talking about laxity in floor coverage.

Q. Did Mr. Haggerty say anything else? A. Well, he started to say, "Mr. Ferrell owns the business. This is the way he wants it. This is the way it's got to be." Then, the salesmen started bringing up the incident about what happened.

Q. Did Mr. Haggerty say anything else that you recall? A. No, sir. I can't recall.

Q. Did Mr. Haggerty say anything about Mr. Frachalla coming over to the new car sales floor and finding that the

salesmen weren't paying attention to a customer on the floor? A. Well, I said Mr. Haggerty started the sales meeting with the idea the floor wasn't covered. Yes, sir.

Q. Did Mr. Haggerty say anything about a couple being on the floor, a man and a woman, at the time that Mr. Frachalla entered the place of business? A. Well, I don't recall he mentioned was specifically a couple. All I know was somebody was there. I don't remember.

Q. Did Mr. Haggerty say anything about your not being able to qualify a customer by the customer's appearance? A. He might have said it.

Q. Did Mr. Haggerty say anything about not being able to tell from looking at a customer whether or not
112 he would buy a car? A. Oh, yes. That I remember.

Yes, sir, and he also stated a percentage figure, 6 out of 10 or 7 out of 10 that are definitely buyers and then went on expounding on that question.

Q. Did Mr. Haggerty say that when Mr. Frachalla walked into the place of business, he saw this couple there that weren't being waited on by any of the salesmen and for that reason Mr. Frachalla decided to wait on the customers and thereby show the salesmen who weren't waiting on the customers that you can't qualify a prospect by the prospect's appearance? A. Yes, sir. He did say that.

Q. That was said by Mr. Haggerty? A. Yes, sir.

Q. Now, what did you say, if anything? A. At this meeting?

Q. Yes. A. Didn't say a word.

Q. You didn't say anything at all? A. I might have—. Well I know I made it my business all the way through the meeting not to say anything if I could possibly help it. I don't believe I did say anything.

113 Q. Were you successful in your business in not saying anything? A. I believe I was.

Q. Isn't it a fact, Mr. Burns, that you made the remark, "Ah, he's just trying to prove a point"? A. If I said it, I don't remember saying it.

Q. Then, you might have said it? A. I might have. I don't think so, though.

* * * * *

115 Q. Did you, Mr. Burns, have a conversation with Mr. Haggerty after the sales meeting on Wednesday morning concerning Mr. Frachalla? A. No, sir.

Q. Did you have a conversation at any time on Wednesday after the sales meeting with Mr. Haggerty concerning Mr. Frachalla? A. Yes, sir. I did.

* * * * *

116 Q. And where did that conversation take place? A. In the showroom near Mr. Ferrell's office. There's some chairs there and I was sitting in one of those chairs and Mr. Haggerty came by me.

Q. Did you also tell Mr. Haggerty to look out for Tom Frachalla? A. Oh, I says, "I suppose Mr. Ferrell knows all about it." I mumbled words to—. I remember saying "Look out for Tom."

Q. Could you have said that, Burns? A. Words to that effect, yes.

Q. To look out for Tom Frachalla? A. No, it wasn't look out.

Q. Did you tell Mr. Haggerty? Did you tell Mr. Haggerty that Tom Frachalla was out to get his job? A. No, sir. No, sir.

Q. Didn't say anything of that sort? A. No, sir.

* * * * *

130 Q. (By Mr. Grabemann.) Directing your attention now to the NLRB election that was held in December, 1961, what was the date of that election?

Mr. Lennon: I object. There were 2 elections held
131 in December, 1961, so if he wants to direct the witness's attention to a specific one, he ought to name it.

Mr. Grabemann: I'm talking now about the election at the Respondent's place of business, Mr. Burns. Do you understand that?

The Witness: Yes, sir.

Q. (By Mr. Grabemann.) When was that election held? A. At Ferrell-Hicks Chevrolet, the election was held December 20th.

Q. And during what hours was the election held on that day? A. It was in the morning. It was the first—. It was 9 to 10, 9:30—9:30, somewhere around 9 o'clock.

Q. Around nine o'clock, and were you present at that time? A. Yes, sir. I acted as an observer for the Union.

Q. Did you see Mr. Ferrell there at that time? A. Yes, sir.

Q. He was present at that time, is that right? A. Yes, sir.

Q. And did you see him before the election started? A. Before the actual balloting took place?

Q. Yes. A. Yes, sir.

Q. And did you see him during the election at any
132 time? A. Yes, sir. He was in the showroom.

Q. And he was away from where you were sitting, is that right? A. No, sir. He was standing right there and were making up the box in which the—the carboard box which the Labor Board uses for casting your ballots.

Q. That was before the election, is that right? A. Before the election. Yes, sir.

Q. And I asked you did you see Mr. Ferrell during the election after the election started? A. Well, I was an observer for the Union, watching the men cast their ballots, and Mr. Ferrell was off to the side.

Q. And then did you see Mr. Ferrell off to the side during the election, is that right? A. Yes, sir.

Q. Now, Mr. Burns, did you say anything about Mr. Ferrell at that time? A. No, sir.

Q. Didn't you make the remark, Mr. Burns, about Mr. Ferrell: "What's that son-of-a-bitch doing here"? Didn't you say that? A. I beg your pardon. I never called him that.

Q. You didn't make that statement then, is that right? A. No, sir.

* * * * *

Mr. Grabemann: May we have the affidavit marked Respondent's Exhibit 1 for identification.

156 (The document above-referred to as Respondent's Exhibit No. 1 was marked for identification.)

Q. (By Mr. Grabemann.) Mr. Burns, I show you Respondent's Exhibit 1 for identification. It's the affidavit that bears your signature on the last page thereof and it's made out in total of some five pages. Have you ever

157 seen this affidavit before? A. Yes, sir.

Trial Examiner: What's the date of it?

Mr. Grabemann: The affidavit, on its last page, states that it was subscribed and sworn to at Chicago, Illinois the 14th day of May, 1962.

Q. (By Mr. Grabemann.) Is that when you affixed your signature to the last page of it and looking here, now, at the last page, that is your signature that appears, is it not? "Andrew Burinskas." A. Yes, sir.

Q. And did you give that affidavit to Mr. McCabe? A. Yes, sir.

Q. Now, Mr. Burns, I direct your attention to Page 3 of the affidavit, although they're not numbered. This is the third page, and I direct your attention to the second full paragraph there and read along here with me, if you will:

"The next afternoon about six, p.m."—and this refers now to May 10, 1962, doesn't it? A. Yes.

Q. "The next afternoon about six p.m. Tom Frachalla and Jack Haggerty called me into Mr. Watson's office. Tom opened the conversation with 'I don't know where to begin, Andy but Jack tells me that you told him to be careful of me'" Is that what it says there? A. That's
158 what it says.

Q. And this is the affidavit that was subscribed and sworn to by you on the 14th day of May, 1962, is that right? A. Uh hum.

* * * * *

183 THOMAS RALPH FRACHALLA was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

* * * * *

184 *Direct Examination.*

* * * * *

Q. In what capacity are you associated with the Respondent? A. Used car sales manager.

Q. And when did you become the used car sales manager? A. March 7, 1962.

Q. Now, prior to that time, Mr. Frachalla, had you ever been employed by the Respondent? A. Yes, sir.

* * * * *

185a Q. And thereafter, Mr. Frachalla, were you again promoted? A. Yes, sir.

Q. When? A. July, 1960.

Q. And to what position were you promoted at that time? A. New car sales manager.

Q. And how long were you the new car sales manager thereafter A. Until my dismissal May 15, 1961.

185b Were you fired at that time? A. Yes, sir.

Q. And who fired you? A. Mr. Ferrell.

Q. Now, following your dismissal as new car sales manager by the Respondent in May, 1961, did you go to work thereafter for another employer? A. Yes, sir.

Q. And for whom did you go to work at that time? A. Southwest Chevrolet, Inc.

Q. Where are they located? A. 9220 South Ashland Avenue, Chicago, Illinois.

* * * * *

Q. During your employment at Southwest Chevrolet, did you ever have occasion to talk to Mr. Burns? A. Yes, sir.

Q. When was the first such occasion? A. Oh, it
186 was in summer, possibly June or July. The exact date I don't remember.

Q. Where did the conversation take place? A. In the showroom at Southwest Chevrolet.

Q. What happened at that time, if anything? A. Mr. Burns, Andy, stopped by during our working day with literature for the salesmen.

Q. And what happened thereafter, then? A. He distributed his literature.

Q. Did you say anything at that time? A. No, sir.

Trial Examiner: What kind of literature?

The Witness: This introduction to the Union.

Q. (By Mr. Grabemann.) Did you have a conversation with Mr. Burns thereafter? A. Yes, sir.

* * * * *

187 Q. (By Mr. Grabemann.) Will you tell use, please, to the best of your recollection, Mr. Frachalla, what was said at that time by Mr. Burns and what was said by you, if anything? A. Again I walked over to my desk with

Andy, one of us was behind the front. I don't remember that well, but I do remember sitting at the desk and engaging in some short conversation and Andy Burns telling me "did you know Mr. Ferrell let you go to suit me?"

Q. This was said by Mr. Burns, is that right? A. Yes.

* * * * *

196 Q. (By Mr. Grabemann.) Shortly after the time that you were rehired by the Respondent, Mr. Frachalla, did you have occasion to have a conversation with Mr. Burns concerning Mr. Jack Haggerty? A. Yes, sir.

Q. Will you tell us, please, where that conversation took place? A. I had to go out and appraise a couple of cars in the garage somewhere on Cottage Grove. I had to go out and make two appraisals on a particular deal. That particular morning Mr. Burns also had a car to be appraised that was not in running condition. Consequently, we rode together to look at the double trade at one spot
197 and Mr. Burns' trade at the other place.

Q. Now, while you were riding together, did you engage in conversation with Mr. Burns?

Mr. Lennon: Excuse me. Could we have an approximate date on this?

Trial Examiner: He said shortly after.

The Witness: A matter of days.

Trial Examiner: In March?

The Witness: Some time in early March.

Q. (By Mr. Grabemann.) Now, did you engage in conversation with Mr. Burns as you were riding along in the same car? A. We talked.

Q. Was he driving or were you driving? A. I was driving the car.

Q. Now, will you tell us, please, what Mr. Burns said to you at that time and what you said to him, if anything?

A. Naturally, we talked. Mr. Burns asked me what I thought of Jack, which meant Jack Haggerty.

Mr. Lennon: I object and ask it be scratched as to what it meant. Let's just have a recitation of the conversation.

Trial Examiner: All right. Go ahead. Wasn't any other Jack in the picture, was there?

198 The Witness: No.

Trial Examiner: All right. Go ahead.

The Witness: "What do you think of Jack Haggerty"? I'm new back on the job, not about to be involved.

Trial Examiner: Give us the conversation.

The Witness: He said, "Watch out for Jack Haggerty. When he smiles, it's with his teeth but you look into his eyes and you could see he's not sincere."

Q. (By Mr. Grabemann.) Was anything else said in that connection? A. He reminded me that Haggerty—Jack Haggerty was building a Haggerty dynasty in reference to the help Mr. Haggerty was putting on as new car sales manager.

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199 Q. Now, after these remarks made to you by Mr. Burns, did you tell Mr. Haggerty about what Mr. Burns had told you? A. Yes, sir.

Q. And when did you do that? A. Within thirty minutes after I was back from the appraisals.

Q. And why did you tell Mr. Haggerty those remarks? A. I thought they were disrespectful. I thought they were used to influence me.

* * * * *

200 Q. I withdraw the question. After you again began working for the Respondent, was there another occasion when Mr. Burns talked to you, this time about Mr. Ferrell? A. Yes, sir.

Q. And when would that have been? A. Oh, about a week, about, after I got back to Ferrell-Hicks.

Q. And on that occasion, what happened, if anything? A. Again being a new man all over again at Ferrell-Hicks and treading softly, I had noticed Mr. Burns was driving a used car which belonged to the used car department which I was responsible for. Knowing Company policy from the salesman to a sales manager and a used car manager again, Company policy is every employee owns and drives his own car excluding nobody, including Mr. Ferrell.

Q. All right. And what else happened, then, at that time? A. I approached Andy and I said, "Andy, I
201 notice you've been driving a used car. Can you tell me the reason why?" He says, "Well, I just sold my demonstrator. I got a new one ordered and I'm waiting for my car to come in." I said, "Well, the only reason I'm asking you, Andy, is the fact that we all own our individual cars. I'm not questioning you in particular. It's just the fact the way we—the setup is in the Company."

Q. What was said next, then, if anything? A. He said, "What's—the boss getting on you about it?" I said, "Not you, not anybody, but I do know Company policy and I'd like to know if he were to question me about it."

Q. And what happened next, then, if anything? A. He says, "Well, I'll see him about that."

Q. What happened thereafter? A. The next day I went to Mr. Ferrell in the general office and I was possibly about 10, 15 feet away, again I'm trying to protect myself by listening to everything I could hear, and he said, "Say, boss, what's this here I can't drive a used car?" This caught Mr. Ferrell completely by surpise. He said, "What do you mean, Andy?" He said, "Well, I understand I'm not allowed to drive a used car, Mr. Ferrell." He's off balance. There's no question about it. He doesn't know
202 where this came from. He said, "Well, what is it, Andy?" He says, "We all own our own cars" or something to that effect.

Q. What was said next, then, if anything? A. Andy said, "Do you know my car is sold and I've got a new car ordered?" Mr. Ferrell said, "I didn't know." "That is the reason why I'm driving a used car." Mr. Ferrell said, "Sure, Andy, until your car comes in, go right ahead."

Q. What happened after that, if anything? A. I walked out on the showroom floor, Andy came to me out in the showroom floor possibly 5, 10 minutes later, he said, "See that. Back him into a corner and watch him squirm."

* * * * *

Q. (By Mr. Grabemann.) Now, Mr. Frachalla, directing your attention to around May 7, 1962, what happened that day, if anything, with reference to your sale of a car? A. I remember it distinctly. It was a Monday night. It was a rainy night; and as a rule, when it's raining, why, not too many people are coming in and out of the door
203 and the salesmen around at the time had become pretty lax. I spend possibly anywhere from 50 to 75 per cent of my time, my workable time, I should say, on the new car side. The bulk of my work is done there. So, sitting in the showroom, salesmen milling about, a young couple pulled up, and I paid particular notice of it because the car they pulled up with was an extra sharp car and I, of course, keep my eye open for an extra sharp car.

Q. What happened next, if anything? A. They walked through the door, four or five salesmen leaning on one car casually looked over their shoulder completely ignoring the people, several other salesmen milling around the showroom completely ignored the people.

Q. What did you do, if anything? A. I got up, greeted the people, sat with them, they priced the car, the price, of course, didn't quite suit them, suggested a used car to them, took them over to the used-car lot, and it was pouring. I still remember.

Q. And what happened there, then, if anything? A.

Picked out a used car, had them drive this car, and within 30 minutes from the time they entered the door we were changing the plates to make the delivery. They had
204 accepted the deal I proposed to them.

Q. And why had you waited on this couple? Was there any particular reason? A. Yes, sir.

Q. Will you tell us, please, what it was? A. Again the salesmen were very lax, and at times, they tend to qualify people by their appearance, by their age, or whatever reason they may have for qualifying people. This was a particularly young couple. They already had a pretty nice car out there, and again it seemed they were qualifying them as not a good prospect to be wasting time with, so I proceeded to take—.

* * * * *

206 Q. Now, on a later occasion did you tell Mr. Ferrell what Mr. Burns had said to you about backing Mr. Ferrell into a corner? A. Yes, sir.

Q. And when was that remark of Mr. Burns passed on to Mr. Ferrell in relation to Mr. Burns having made the remark? A. The first opportunity I had to tell him, a matter of hours.

Q. And why did you tell Mr. Ferrell about those remarks to you by Mr. Burns? A. I thought they were disrespectful to the man that was employing us.

* * * * *

222 Trial Examiner: Who made the decision to discharge Mr. Burns?

The Witness: We both did.

Trial Examiner: You both did?

The Witness: Yes, sir.

Trial Examiner: Did you have jurisdiction over Mr. Burns?

The Witness: I had authority.

Trial Examiner: To discharge?

The Witness: Yes, sir.

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225 Q. (By Mr. Grabemann.) Mr. Frachalla, was the decision made on the evening of May 9, 1962 to discharge Mr. Burns? A. Yes, sir.

Q. Now, Mr. Frachalla, what happened, then, on the following day, May 10, 1962? A. Well, actually, we talked a little more on May 9th about the reasons for discharging Mr. Burns.

Q. Now, let me interrupt you, Mr. Frachalla, before you go on. Was there anything else said that hasn't already been mentioned? A. It had been mentioned but before we decided Mr. Burns had to be fired we went over the six different reasons that we thought would be the reasons for us firing him.

Q. Which were the reasons in your mind and Mr. Haggerty's for discharging Mr. Burns?

226 Mr. Lennon: I object. Is he going to testify now as to what was in Mr. Haggerty's mind?

Trial Examiner: Well, you said you discussed six reasons why he was discharged?

The Witness: Yes.

Trial Examiner: What were they?

The Witness: Jack had finished telling me about the belittlement at the sales meeting and Jack had that impression. When Jack told me that he was warned by Mr. Burns to look out for me, which meant my impression was Jack was to fear me, watch out for me and cause animosity. I repeated to Jack the fact that if Andy Burns were as concerned in Jack Haggerty as he claimed to be, why did he tell me to look out for Jack Haggerty? Why did he belittle Jack with the Haggerty dynasty? Why was Mr. Ferrell referred to as an S. O. B.?

Mr. McCabe: Mr. Examiner, I object.

Trial Examiner: In other words, all these so-called—. You said these six reasons that you—. Is that the way you described it?

The Witness: Yes, sir.

Trial Examiner: All had to do with these derogatory statements that you have testified to that he made either about you or Jack, is that right?

The Witness: Or Mr. Ferrell.

227 Trial Examiner: Or Mr. Ferrell.

Q. (By Mr. Grabemann.) On May 10, 1962, Mr. Frachalla—. Strike that. On May 10, 1962 what happened on that day, if anything, with reference to you, Mr. Haggerty, and Mr. Burns? A. We agreed in unison because of the nature of the reasons that concerned both Haggerty and myself and because of the statement Mr. Burns had made in the past that Mr. Ferrell fired me to suit him. We agreed that we would release him together. He would be let go from Ferrell-Hicks and we agreed to do it at one time.

Mr. Lennon: I move to strike that answer on the grounds it doesn't relate a conversation between anybody we knew. We don't know where it occurred. It just seems to be a gratuitous statement by the witness.

Mr. Grabemann: We'll get to that.

Trial Examiner: Motion denied. Go ahead.

Q. (By Mr. Grabemann.) Was there any reason why you decided to talk to Mr. Burns together? A. Yes.

Q. Will you tell us, please, what the reason was? A. I was going to fire Andy Burns and because he would doubt my authority to do it, Jack was there to back it up, and the reason I wanted this opportunity to fire Andy Burns—he told me Mr. Ferrell told him I was fired to suit him.

228 I felt that Andy Burns was giving me more aggravation and I didn't want any. I felt that this was my chance to fire a man that had caused me to get fired.

Q. Now, when did you and Mr. Haggerty inform Mr. Burns of his discharge? A. It was around five o'clock in the evening.

Q. Had there been an opportunity to inform him earlier that day of his discharge. A. In the morning hours we are pretty busy, nine to one, which was, I believe, Andy was on the floor at that time. I have my wholesaling to do, my reconditioning, to shape up; Jack has his new car business to get squared away at one o'clock or so, looked around and Andy wasn't there. He was off the floor.

Q. All right. When did you next see Mr. Burns? A. Around five.

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250 *Cross-Examination.*

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259 Q. Did you consult Mr. Ferrell about whether Andy Burns would be discharged or not? A. No, sir.

Q. When did Mr. Ferrell become aware of the fact that Mr. Burns was discharged from his employment? A. The next morning.

Q. Which would be which morning? A. Fired on the 10th; it would be May the 11th.

* * * * *

269 *Direct Examination.*

Q. (By Mr. Grabemann.) What is your business, please, Mr. Herman? A. I am a salesman.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet, Inc.

Q. And how long have you been associated with
270 Ferrell-Hicks? A. Since October, middle of October, 1961.

Q. And you have been associated with Ferrell-Hicks from that time forward as a salesman? A. Yes, sir.

Q. Directing your attention, now, Mr. Herman, to on or about May 9, 1962, a day or so before the discharge of Mr. Burns, were you present at a sales meeting held on that day? A. Yes, sir.

Q. Will you tell us, please, to the best of your recollection, what was said during that sales meeting by Mr. Haggerty, if Mr. Haggerty was present? A. Mr. Haggerty told about a sale made by Tom Frachalla a day or two before the sales meeting. This customer had walked around the showroom, the salesmen were busy talking.

Trial Examiner: Just a minute. Is this—?

Mr. Grabemann: This is what Mr. Haggerty said?

The Witness: This is what Mr. Haggerty said. The customer had walked around the showroom, salesman were busy, and the customer approached Tom Frachalla.

Q. (By Mr. Grabemann.) And what was said next, then, if anything, by Mr. Haggerty? A. Some of the salesmen were talking amongst themselves, they weren't paying attention to the customer; therefore if they
271 had looked at the customer, they qualified him not a buyer.

Q. What was said next, then, if anything, by Mr. Haggerty? A. "This proves that you cannot qualify a customer just by looking at them. You have to greet them at the door. You have to talk to them and find out what they want and what their intentions are."

Q. Did Mr. Haggerty say anything thereafter? A. That we should greet the people at the door and not qualify them by sight but at least talk to them, treat them as you would—a customer should be treated.

Q. Was Mr. Burns present at that sales meeting? A. Yes, sir.

Q. Did Mr. Burns say anything at that point?

Mr. Lennon: I suggest that it's leading. Should have a development of the conversation at the meeting, not having counsel direct how it happened.

Trial Examiner: Objection overruled. He may answer. Go ahead.

Q. (By Mr. Grabemann.) Did Mr. Burns say anything at that time? A. Yes, sir.

Q. Now, to the best of your recollection, Mr. Herman, will you tell us what you recall Mr. Burns saying or
272 doing at that time? A. Well, saying and doing?

Q. Yes. A. Mr. Burns was sitting in the far corner near where the filing cabinet was across the room; Jack was up in front of the room; Mr. Burns is sitting in a chair. He said, "That's a lot of—."

Q. Now, give us the exact language as you remember it, Mr. Herman. What is it Mr. Burns said? A. "That's a lot of s-h-i-t." He said, "You're just making an issue out of it.

Q. This is what Mr. Burns said at that time? A. To the best of my recollection, yes.

Q. What was he doing as he said this? A. He was sitting in a chair and leaning back.

Q. Just as you are leaning back now in your chair, is that right? A. Yes.

Q. What happened next, then, if anything? A. We all laughed at him because—well, the tone of voice.

Q. What about the tone of voice of Mr. Burns? A. Well, just like he's trying to take issue himself.

Q. And after the laughter, then what happened next, if anything? A. The salesmen started talking among themselves.

273 Q. Yes. A. And in a few minutes the meeting was broken up, we all left.

Mr. Grabemann: No further questions.

Cross-Examination.

Q. (By Mr. McCabe.) Mr. Herman, who was present at this sales meeting? A. About ten salemen present as well as Mr. Jack Haggerty.

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274 Q. Did Mr. Harrison say anything at that meeting? A. No one said anything outside of the sales manager and this remark from Andy Burns.

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Q. (By Mr. McCabe.) I just want to clear up one other point. I believe you testified that Jack Haggerty, at this meeting, stated that on this prior evening the salesmen were busy. Did he say that, and not taking care of this customer? A. They were busy talking among themselves, Yes, sir.

Q. They were busy talking among themselves? A. The reason I remember very clearly that the two nights before—not the previous night—is that I was busy at my desk with another customer.

Q. Were you there on—? A. Yes, sir. I was 275 there.

Q. And you saw this? A. I didn't see this incident. I was busy with my customer; when I have a customer, I take care of my customer. I don't worry about anybody else.

Q. Was the fact you were there have to do with your remembering what Jack said? A. Because as soon as I was finished talking to the customer I had at my desk, another customer walks up to my desk and says, "Are you busy?" This customer had nothing to do with the one that Tom Frachalla sold. I said, "I'd be happy to help you." He said, "Those fellows over there are busy talking among themselves. I'd like to know something." I sat him down, found out what kind of car he was interested

in, took his name and address. I tried my best to sell him. He was a little irritated inside.

Q. Never mind.

Mr. McCabe: I think that answer—.

Mr. Grabemann: Let him finish his answer.

Trial Examiner: I know, but his remark that he was a little irritated—.

The Witness: The customer was. The reason: He says, "You got a funny place over here. Look at those
276 guys talking." I said, "Well, they may have just finished a customer." He says, "Oh, no. I was standing around there and I stood right next to the guy. They kept on talking among themselves. Then I finally saw you were busy; but as soon as you were through, I walked over and talked to you." I said, "Will you be so kind as to repeat that in front of someone else?" He said, "Yes, I would." I took him over to Jack Haggerty and Tom Frachalla. They were at the center car towards the back of the car toward Jack's office from the center car. That's where the customer and Tom Frachalla and Jack Haggerty met. I said, "Will you please repeat what you told me at my desk?" The customer repeated that, and both of them will recall it, I'm sure. That's the same evening that Tom Frachalla sold a car to another customer.

Q. (By Mr. McCabe.) Who were those three salesmen? A. I don't remember the other salesmen. I had my own work and I just pay attention to my business. I have enough troubles getting my sales up. I don't worry about the others. The customer came to me as soon as the one—.

Q. And pointed out to you that they were over there and talking among themselves? A. Correct.

277 Q. And were not taking care of people and—? A. The customer didn't say that, though.

Q. You told them you thought this was sufficiently important for you to take it to the sales manager but you

still don't know who these salesmen were? A. I didn't pay any attention to the salesmen. I paid attention to the managers.

Trial Examiner: Well, did you know who the salesmen were?

The Witness: That were standing around?

Trial Examiner: Yes, that were neglecting the sale.

The Witness: I don't pay any attention to the salesmen. I take care of my own customers. I don't know.

Trial Examiner: You said this man pointed to them.

The Witness: This man said, "Look at those guys over there talking."

Trial Examiner: Did you look to see who they were?

The Witness: No, sir. I was looking right in his eye. I said, "They may have been busy or something." I'm not going to call attention to it myself. If the customer wants to fight, I'm going to try to smooth it over. I looked him right in the eye. I said,"They may have
278 been doing something else and just came there." He said, "I stood right alongside of them and they kept on talking and finally I walked away."

Q. (By Mr. McCabe.) What is your idea of smoothing it over? Was it talking to the manager and reporting this? A. No, sir. No, sir.

Mr. Grabemann: Objection to the question.

Mr. McCabe: Very proper question.

Trial Examiner: Yes, your objection is overruled.

The Witness: I wasn't trying to smooth it over with the managers. I was trying to smooth it over with the customer because the customer's throwing it at me. I wasn't getting anywhere trying to sell him. I thought if the customer can go to the manager and get it off his chest, maybe I got a chance to make a sale.

Trial Examiner: And you say that was both Mr. Frachalla and—.

The Witness: I brought him to Jack but Tom Frachalla was standing nearby. Jack pointed like this and they both stood in back of the car in the center of the showroom. That's the back would be toward the drinking fountain or Jack's office.

Trial Examiner: What did they do, if anything?

The Witness: Tom is very smooth. I mean Jack Haggerty is very smooth. He says, "We appreciate your
279 telling us this and we will try to go and remedy it. At the next sales meeting he brought it up.

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289 Trial Examiner: Did Mr. Burns—did he make his remark loud enough so Mr. Haggerty could hear it?

The Witness: Yes, sir.

Trial Examiner: So that everybody heard it?

The Witness: Yes, sir.

Trial Examiner: Did Mr. Haggerty say anything about that when that remark was made?

The Witness: Mr. Haggerty couldn't say anything.

Trial Examiner: I'm asking you did he?

The Witness: No, sir.

Trial Examiner: Why couldn't he?

The Witness: He was laughing.

290 Trial Examiner: How's that?

The Witness: He made so much noise laughing. We all busted out laughing.

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FERDINAND R. GILMORE, was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined, and testified as follows:

* * * * *

291 *Direct Examination.*

Q. (By Mr. Grabemann.) What is your business, please? A. I am a salesman.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet.

* * * * *

292 Q. Mr. Gilmore, directing your attention to on or about May 9, 1962, did you attend a sales meeting at that time? A. Yes, sir. I did.

Q. And when was that in relation to Mr. Burns' discharge? A. Oh, that was a day or two before his discharge.

Q. And will you tell us to the best of your recollection where that sales meeting took place? A. Meeting in our regular sales meeting building across the street, the used car building.

Q. And to the best of your recollection, Mr. Gilmore, will you tell us, please, what was said by Mr. Haggerty during that sales meeting with reference to what Mr. Frachalla had done a day or two earlier? A. Well, Mr. Haggerty said that Tom Frachalla sold a car last night to a man who was roaming around the floor of the sales room that had not been waited on by the salesmen that were on the floor.

Q. And do you recall what else Mr. Haggerty said at that time? A. And Haggerty said, "You cannot qualify a man by sitting on a chair and just looking at him walk through the door.

Q. What was said next, then, if anything? A. And Andy Burns said. "That's a lot of shit. He's just
293 trying to make an issue out of it.

Q. And what happened thereafter? A. Well, with that, the salesmen were there, of course they started a lot of noise and laughing and that was it and a minute later the meeting was over, dismissed, and went across the street and had coffee.

* * * * *

294 Q. Who was present at this meeting? A. The salesmen.

* * * * *

297 Q. Now, Mr. Gilmore, is it your statement under oath here today that not one salesman protested to Mr. Haggerty about Mr. Frachalla taking that sale?

Mr. Grabemann: Objection.

Trial Examiner: What's the basis of your objection?

Mr. Grabemann: The word "protest" can't have any meaning whatever. That's the first basis for it.

Trial Examiner: Objection overruled.

The Witness: Well, I'll take my part of that. Mr. Haggerty's the sales manager, and I don't protest to Mr. Haggerty on anything. He's the sales manager, so I don't know why anybody else would.

Q. (By Mr. Lennon.) I didn't ask you why. I asked you did anybody. A. No, sir.

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299 ISABEL LA BAN, was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination.

Q. (By Mr. Grabemann.) What is your business, please, Miss LaBan? A. Bookkeeper.

* * * * *

300 Q. Now, Miss LaBan, you recall whether or not there was ever an NLRB election held at the Respondent's place of business? A. Yes, there was.

Q. And was that election held within the last year or two? A. Yes.

Q. Will you tell us, please—. Strike that. Would that election have been held around December 20, 1961? A. I believe so.

Q. And at that time, Miss LaBan, did you in any way participate in that election? A. Yes, I did.

Q. In what capacity did you participate? A. I was an observer.

Q. Now, do you know Mr. Andrew Burinskas? A. Do I know of him?

Q. Yes. A. Yes, I do.

Q. And do you also know him by the name Andy Burns? A. Yes.

Q. Was he present at that time? A. Yes, he was.

Q. And in what capacity, if any, was he active
301 in this election? A. I think he was also an observer.

Q. And were you present, then, at all times during the election? A. Yes.

Q. And where, in relation to where you were physically, was Mr. Burns while that election was being conducted? A. He stood right alongside of me all through the election.

Q. And during that time, then, that Mr. Burns was standing alongside you, did you have any conversation with him? A. Not any lengthy conversation, no.

Q. Was anything said by Mr. Burns regarding Mr. Ferrell? A. Yes.

Q. Now, will you tell us, please, to the best of your recollection what you heard Mr. Burns say at that time concerning Mr. Ferrell? A. Well, at one time during the election, he swore at Mr. Ferrell.

Q. Mr. Burns swore at Mr. Ferrell? A. Um hum.

Q. Now, I know, Miss LaBan, that you don't use this kind of language, whatever it was, but it's important for us to get exactly what you heard Mr. Burns say.
302 You understand that, don't you?

Mr. Lennon: Mr. Trial Examiner, could we get a proper foundation here. Was the balloting in progress? In other words, we are using the term "during the election." I'd like to know when it occurred and where, what the relationship of the parties were.

Mr. Grabemann: I think we have laid a foundation for this conversation, Mr. Examiner.

Trial Examiner: Yes, I think so. There is sufficient foundation laid. Give us exactly what he said.

Q. (By Mr. Grabemann.) In the exact way he said it as you recall it. A. Well, he said. "Get that son-of-a-bitch out of here."

Q. And you heard Mr. Burns say that, is that right? A. Yes.

Q. He was referring to Mr. Ferrell? A. Yes.

Q. Could you see Mr. Ferrell at that time? A. Yes, he was at the other end of the showroom.

Mr. Grabemann: No further questions.

* * * * *

304 Q. Did you report this to Mr. Ferrell, that Mr. Burns had made this statement? A. Well, no. I didn't have the heart to.

Mr. McCabe: No further questions.

Q. (By Mr. Lennon.) You say you did not tell Mr. Ferrell about this remark? A. Not to him directly, no.

Q. To whom did you tell it? A. I think I mentioned it to Mrs. Klinnicke, who is my superior..

Q. When did you tell her about it? A. Right after the election was all over.

Q. When Mr. Burns said this remark, did he say it to Mr. Ferrell? A. No, he didn't say it to Mr. Ferrell, no.

Q. To whom did he say it? A. Well, to us, I guess, the people around us, you know, around the table.

Q. Did several people hear it? A. Yes, I'm sure there were several people that heard it.

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307 ALMA KLINNICKE, was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

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Direct Examination.

Q. (By Mr. Grabemann.) What is your business, Mrs. Klinnicke? A. I am a business manager.

Q. And with what firm are you associated? A. Ferrell-Hicks Chevrolet, Inc.

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312 Q. Now, Mrs. Klinnicke, I direct your attention to some time shortly after the NLRB election held at the place of the Respondent's business in 1961. In

December of 1961 did you have a conversation shortly after the election with Miss Belle LaBan concerning something she had heard Mr. Burns say about Mr. Ferrell? A. Yes, I did.

Q. Now, how long after the election did Miss LaBan make this statement to you? A. Oh, I should say not more than ten minutes or fifteen, something to that effect. I really don't know, in fact.

Q. And will you tell us, please, what Miss LaBan
313 said to you at that time with reference to what she had heard Mr. Burns say about Mr. Ferrell? A. Well she repeated to me what Mr. Burns said and she said, "How could he say that?"

Q. All right. Now, Mrs. Klinnicke, did Miss LaBan give you the exact language that Mr. Burns was supposed to have used? A. Exactly what she said on the stand a few minutes ago, yes.

Q. And once again, I know that you don't use this kind of language but it's important to get the record strainght.

Mr. Lennon: Excuse me. She just said she heard the witness say it. She said that it is said what she said. I don't see any reason for—.

Trial Examiner: I think it's clear she was here while the testimony was given.

Q. (By Mr. Grabemann.) Were you here, Mrs. Klinnicke, when Miss LaBan testified? A. Yes, sir.

Q. And you heard the remark she then made to you, was the same as the one Miss LaBan made while she was testifying? A. Yes, sir.

Q. Now, after that conversation with Miss LaBan,
314 did you have an occasion to talk to Mr. Haggerty?

A. Well, Mr. Haggerty was walking through the office, I think, approximately the same time she finished the conversation.

Q. Right, and did you say anything to Mr. Haggerty

about what had been told you by Miss LaBan? A. Well, yes. I stopped in at my desk and told him what she said. I said, "Can you imagine that?"

Q. And once agains, then, the remark you passed on to Mr. Haggerty was the same remark or the same thing that had been told you by Miss LaBan, is that right? A. Yes, sir. That's right.

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329 JACK HAGGERTY was called as a witness by and on behalf of Respondent, and having been first
330 duly sworn, was examined and testified as follows:

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Direct Examination.

Q. (By Mr. Grabemann.) What is your business, Mr. Haggerty? A. The automobile business.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet.

Q. How long have you been associated with Ferrell-Hicks? A. I went to work for them in 1961.

Q. And in what capacity are you employed by Ferrell-Hicks? A. As a new car sales manager.

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331 Q. Now, you became new car sales manager when in 1961? A. I became new car sales manager in May of 1961.

Q. Now, Mr. Haggerty, about a week after you became the new car sales manager at the Respondent's place of business, did you have occasion to talk to Mr. Andy Burns? A . Yes.

Q. Where did that conversation take place? A. In my office.

Q. And did you call him into your office at that time?

A. He was in my office waiting for an appraisal at the time.

Q. And will you tell us, please, what was said at that time between you and Mr. Burns? A. Andy said
332 to me, he said, "Jack, I can work for you." He said, "I couldn't work for Tom but I can work for you and I'll be able to sell cars."

Q. Now, directing your attention to around March, 1962, was the Respondent in need of a new used car sales manager at that time? A. Yes.

Q. And did you have any discussions with Mr. Ferrell in that connection? A. Yes.

Q. Tell us, please, what was said at that time between you and Mr. Ferrell? A. I suggested—. Well, we needed a new used car manager because the man we had was leaving us voluntarily, so I gave—Mr. Ferrell asked me "who is a good, qualified used car manager?" He said, "I want a good one" and I mentioned three people. He said "Jack, which one would you want, which one do you want and which one can you work with?"

Q. What was said next, if anything? A. Well, I said—I suggested Tom Frachalla, and Mr. Ferrell said to me, "Jack, if you want him and you can work with him, fine."

Q. And thereafter, then, did you contact Mr. Frachalla? A. I proceeded to call Tom up and ask him if he would
333 like to go to work at Ferrell-Hicks.

Q. And thereafter, did Mr. Frachalla go to work for Ferrell-Hicks? A. Yes, he did.

Q. In what capacity? A. As the used car sales manager.

Q. Now, Mr. Haggerty, directing your attention to May 9, 1962, were you present at the sales meeting on that day? A. Yes, I was.

Q. Will you tell us, please, what you said at that sales

meeting at that time? A. I don't remember exactly what the earlier part of the meeting was but I did state the fact —go over the normal things. I checked, oh, on the supply of automobiles we had on hand. We needed sales; we needed this; and we needed a little pep and enthusiasm. I brought up the point, and the main point of my sales meeting was the fact we had had a customer—the main thing I remember of my sales meeting was handling people when they came into the showroom, and it is the most important part of our business is to talk to people and greet them when they do get in our place.

Mr. McCabe: I object, Mr. Examiner. He's asked to give what he said in the meeting, not the most im-
334 portant factor about it.

Q. (By Mr. Grabemann.) Is that what you said at that time? A. I told this to the salesmen. I said, "It's the most important thing in our business to meet those people when they come into the showroom and meet them properly and to talk to them and not to leave them wander around the showroom," and I went into this extensively for maybe five or ten minutes.

Q. What was said next, then, if anything? A. Then, I brought up the fact that last night in the showroom we had an occasion where Tommy Frachalla, our used car sales manager, had taken an up on the showroom floor. I stated he had not taken this up until the customer had walked past four or five salesmen that were on the floor. He spent some time waiting and looking at a car and then, Tommy Frachalla went over and greeted him and talked to him. I said, "Within 30 minutes Tommy Frachalla sold him an automobile and delivered it."

Q. What was said next, then, if anything, Mr. Haggerty? A. Just as I was completing my sales meeting Andy Burns, who was in the audience said, "Ah, shit," he said, "He's just trying to make a point of it."

Q. And what happened thereafter, if anything?
335 A. Well, right after that it was actually the end of my sales meeting, right at the end, the last pitch of my sales meeting, and it actually broke up the sales meeting. It ruined the whole effect I had on the men.

Mr. Lennon: I object to the characterization the effect upon the men.

Trial Examiner: The last part may be stricken.

The Witness: All the men, instead of walking out of this area with a smile on their face and walking out normally as they do at every other meeting—.

Mr. Lennon: I object to this.

The Witness: This is fact. This is what happened.

Trial Examiner: Go ahead.

The Witness: The salesmen, instead of walking out to coffee as they do every other morning, they broke out laughing and they broke out commenting. I don't know what was said. I don't know what was said between them but he broke the point of my sales meeting.

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Q. (By Mr. Grabemann.) Now, Mr. Haggerty, later that day did you have occasion to see Andy Burns? A. Yes, I did.

336 Mr. Lennon: I'm sorry, Mr. Grabemann. I didn't hear your timing. Will you say it again, sir?

Q. (By Mr. Grabemann.) Later that day—

Mr. Lennon: Thank you—did you have a conversation with him when you saw Mr. Burns later that day?

A. Yes, I did.

Q. And where did that conversation take place? A. That conversation took place in my office.

Q. And about what time did that conversation take place? A. I would suggest about 2, 2:30 in the afternoon, early in the afternoon.

Q. Will you tell us, please, what was said on that oc-

casion between you and Mr. Burns? A. Andy Burns came into my office, he sat down, he said, "Jack," he said, "Tom Frachalla is out to get your job." He said, "I'm warning you."

Mr. Lennon: Mr. Trial Examiner, I'm having trouble hearing.

Trial Examiner: Read the last answer back.

(Answer read.)

The Witness: In other words, he shook his hand at me when he stated this.

Q. (By Mr. Grabemann.) What did you say at
337 that time, if anything? A. I said, Andy, I don't think it is.

Q. Was anything else said at that time? A. Yes. Andy said, "Believe me, he is, Jack."

Q. Now, later that day did you have occasion to see Mr. Tom Frachalla? A. Yes.

Q. And when was it that you saw him? A. About 9 to 9:15 that evening.

Q. And did you have a conversation with him at that time? A. I had a short conversation with him at that time.

Q. What did you say to him at that time and what did he say to you, if anything? A. Tom asked me how the sales meeting was. I said, "I had a little problem this morning and I also had another problem in my office with Andy Burns" and I said, "I'd like to have you stop by my house and talk it over."

Q. And thereafter, did you meet with Mr. Frachalla in your home? A. Yes, I did.

Q. And about what time did you meet with him? A. About eleven o'clock.

Q. And did you have a conversation with Mr.
338 Frachalla at that time? A. Yes, I did.

Q. Will you tell us, please, what was said at that

time between you and Mr. Frachalla with reference to Mr. Burns?

Mr. Lennon: Same objection. We've been all through this ground before.

Trial Examiner: You may answer.

The Witness: I walked in the house and I met Tom Frachalla and our wives were together and Tom asked me, he said, "What happened? What's the story"?

Mr. Lennon: Mr. Trial Examiner, I'd like to have a continuing objection.

Trial Examiner: Yes, you have.

Mr. Lennon: It seems to me you stopped Mr. Frachalla from testifying to the same conversation on the ground it was hearsay and self-serving. It seems to me it's hearsay and self-serving coming out of the mouth of Mr. Haggerty.

Trial Examiner: He may answer:

The Witness: I told Tom Frachalla about the sales meeting. I told him that the sales meeting—what had happened. I told him, "Andy Burns had stated at the sales meeting, after I told the story about how he took the up on the floor and sold the automobile, that Andy Burns had said, 'Ah shit. He's trying to prove a point.'" Then,
339 I proceeded to tell Tom Frachalla, Andy Burns had come into my office and warned me. He said, "Jack Haggerty, Tom Frachalla is out to get your job." I told him, I said, "Andy, I don't think he is." He said, "Jack, beware. He's out to get your job."

Q. (By Mr. Grabemann.) What was said next, then, if anything? A. Tom then went over the fact that Andy Burns had told him that I smile with my—I smile with my teeth but you could tell I wasn't sincere by looking into my eyes. He also stated that I was a Haggerty—I was trying to start the Haggerty dynasty at Ferrell-Hicks.

Q. What was said thereafter, if anything? A. Then, I told him that Andy Burns had called Mr. Ferrell a son-of-a-bitch.

Q. And what was said next, then, if anything? A. Then, Tom and I concurred in the idea that we had to leave Mr. Burns go. We couldn't have that man work for us and think this way about the used car manager, about the new car manager, and about the owner of the business.

Q. What was said next, if anything? A. We agreed we were going to leave Mr. Burns go in the morning.

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340 Q. And for what reason did you come down to the Respondent's place of business on our day off? A. Well, the principal reason I came down was to sit down with Tom Frachalla, call Andy Burns in the office, and to leave him go.

Q. And did you and Mr. Frachalla get that opportunity later in the day? A. We got that opportunity about five o'clock that day.

Q. And was there an opportunity to talk to Mr. Burns earlier that day? A. No, sir. There was not an opportunity.

Q. Why? A. In the morning either Tom was busy or I was busy or Mr. Burns was busy, and Tom and I both got free about one o'clock. We turned around and Andy's floor time had expired and he had left.

Q. When did you next see Mr. Burns? A. Approximately five o'clock.

Q. And what happened then, at that time? A. We
341 called Mr. Burns into the office. It's right behind mine. It's a closing room right behind my office.

Q. You and Mr. Frachalla called Mr. Burns in? A. That's right.

Q. And did a conversation take place at that time? A. Yes.

Q. Were you, Mr. Frachalla, and Mr. Burns the only ones present during that conversation? A. That is right.

Q. Will you tell us, please, what Mr. Frachalla said

at that time, what Mr. Burns said at that time, and what you said at that time, if anything? A. Well, we walked into the room and we all sat down. Tommy started the conversation by saying to Andy, "Andy," he said, "You said something." He said, "You've talked—." He said, "You've stated that Jack smiles with his teeth but you can tell by looking into his eyes that he's not sincere. You stated to me that Jack is trying to build a Haggerty dynasty here." Then, he said, "Then, yesterday you told Jack that I was trying to get his job and you warned him to beware," and with this statement Andy broke in and he looked to me and he says, "Does that mean I'm through? Does that mean I'm fired" and I said, "Andy, yes. Yes." He says, "Does that mean I'm fired?" I said, "Yes, if you want me to say it, yes, you're
342 fired."

Q. Was anything else said at that time? A. Yes, there was something else said at that time.

Q. What else? A. After I said he was fired, he stated, "Well, what I said was true. All the things I said were true. He is trying to get your job."

Q. What was said thereafter, if anything? A. I said, "Well"—I didn't say much. I didn't say anything. I just said, "Well, I consider it over, the matter over and completed."

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343 Q. Now, Mr. Haggerty, do you know whether or not the Respondent has a collective bargaining relation ship with any other labor organizations? A. Yes.

344 Q. And how many different labor organizations does the Respondent have a collective bargaining relationship with? A. With three.

Q. And has that relationship with those three organizations existed for some years as far as you know?

Mr. Lennon: I object.

Trial Examiner: You may answer.
The Witness: Yes, it has. No problems.

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345 Q. Do you know, Mr. Haggerty, whether the Respondent had a Christmas party for—strike that. Was there a Christmas party held for salesmen at the Respondent's place of business in 1961? A. Yes.

Q. How was the date for that party selected? A. It was selected by the salesmen, our salesmen.

Q. Will you explain that, please, to the Trial Examiner? A. Mr. Ferrell sponsored a Christmas party for us, so we are going to have it by popular demand. They suggested we have it at Mangram's Chateau, and we—we had two dates offered to us; either one before Christmas or one after Christmas, and the salesmen all voted they would rather have the party before Christmas and that's the date we picked.

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347 Q. Now, prior to the NLRB election that was held at the Respondent's place of business around December 20, 1961, did you and Mr. Burns ever engage in any conversations concerning a union? A. Yes.

Q. And how many different times were there when a conversation was engaged in between the two of you concerning a union? A. This is before the election?

Q. Before the election. A. We talked twice explicitly about the Union.

Q. Before the election? A. Yes.

Q. Now, on one occasion was there any discussion concerning the purpose of the Union? A. Yes, the first.

Q. Now, when did that conversation take place?
348 A. Approximately October.

Q. That would be October of 1961? A. Yes.

• • • • •

Q. Will you tell us, please, what was said at that time by you and what was said by him, if anything regarding the Union? A. Well, I asked Andy, I said, "What is the purpose of the Union? What can it do for Ferrell-Hicks? What can it do for the salesmen? What can it do for me"? And Andy went through it and he explained what the Union—what the Union was.

Q. And was anything else said then in that connection? A. Yes, I told Andy at that time, after he explained to me about the Union and all about it, I said, "Andy," I said, "if you think the Union is what you want, if you think it's for the men and for the betterment of the
349 men and you honestly believe this to be true," I said, "You are bound morally to follow it up and stay with it." I said, "You never will feel right the rest of your life if you didn't do it."

Q. Now, on another occasion prior to the election in December of 1961 did you and Mr. Burns engage in any conversation concerning a Tom Haggerty? A. Yes.

Q. Now, will you tell us, please, where that conversation took place? A. It took place in my office.

Q. And who is Tom Haggerty? A. Tom Haggerty is my next-door neighbor and a very personal friend of mine. He's also secretary-treasurer of the Milk Driver Union.

Q. Is that a Teamster union? A. Yes, it is.

Q. And that's secretary-treasurer of a Teamster union here in this city? A. Yes, it is. He is the man who ran against Jimmy Hoffa about four or five years ago.

Q. Now, yes. Now, on that occasion, Mr. Haggerty, will you tell us, please, what was said by you and Mr. Burns? A. Andy was in my office and waiting. There was time to spare and I asked Andy, I said, "How's
350 the Union going?" He said, "Boy you should be for it being a good friend of Tom Haggerty." I said, "Well, certainly, Andy. I have nothing against the Union"

and I said, "As you know, Tom Haggerty is a real good friend of mine, even more than you think. You don't realize but our wives are together every day."

* * * * *

352 Q. After the election, Mr. Haggerty, did you have any conversation with Mr. Burns concerning the Union? A. Yes, I did.

Q. And was there more than one such occasion? A. There possibly were two occasions.

Q. Now, when was the first occasion? A. The first occasion was shortly after, possibly, maybe, just a day or two after the election, maybe three days. I don't remember just exactly when.

Q. And where did that conversation with Mr. Burns take place? A. In my office.

Q. And were you and Mr. Burns the only ones present at that time? A. Yes, I think we were.

Q. Now, at that time, will you tell us, please, what you said and what he said with reference to Union matters? A. I had seen a letter dropped off into my office: "Keep the Ball Rolling." It had been written by Andy Burns to his Union members and—at least I think it was to his Union members. It was passed out, at any rate.

Q. Now, Mr. Haggerty, I refer you to General Counsel's Exhibit 3 in evidence and I ask you whether or not that is a copy of the letter that you saw at that
353 time? (Document tendered to witness.) A. Yes, it is.

Q. And what was said then, at that time, between you and Mr. Burns? A. Well, I had heard that when he had lost the election at Ferrell-Hicks, that he was going to give up the Union.

Q. Now, from whom had you heard this? A. One of the salesmen that had come in. I don't know who it was.

Q. And what was said then on that occasion? A.

When I saw the letter, I asked Andy so I'd know honestly whether he was or wasn't. Andy said, "No, Jack. I'm not going to give up the Union because of the fact so many salesmen have called me up and told me what a good job I've done and to stick with it."

Q. And was anything else said at that time that you remember? A. No, I just said, "Well, fine," and that was all.

Q. And you didn't call him into your office, did you, at that time? A. No, I didn't. He was in the office.

Q. Now, on the second occasion when you had a conversation with Mr. Burns after the NLRB election in December, 1961, when did that conversation take place?

A. I don't remember exactly when it did take place.
354 It was within, oh, approximately, oh, I'd say maybe a month or two after the election. Possibly January or February. I can tell you the occasion.

Q. All right. Will you tell us, please, what the occasion was for your discussion with Mr. Burns at that time? A. Again I had seen a piece of literature that Mr. Burns had put out concerning his contract proposals for the dealers that had won—had been contested or had won the election. That's what he was giving out to the salesmen. I read over this contract proposal and I told him it was economically impossible for a dealer in the Chicago area to pay that amount of money to their salesmen and stay in business.

Q. What did he say to you at that time, if anything? A. He said, "No, Jack. It is possible to pay this." He said, "What you have to do is unionize all the dealers. Then, we'll make the people pay more money for the cars. When the people pay more money for the cars, then we can pay more commission to the men." I said, "Andy, that is possible if the people would pay more money, but," I said, "I personally think that you could not force the

people to pay more money" and I said, "It would be impossible to organize the dealers." I said, "The dealers on the outside of Chicago, along the suburbs, would steal all the busines out of Chicago, or the small dealers 355 where they had no salesmen or just an owner in some way" and Andy said, "We have a system worked out for that.

Q. What was said next, if anything? A. I said, "Andy, this system, how would it work for a dealership" and I mentioned the name of City Auto Sales. It's a big Chevrolet dealership on the south side of Chicago and they do a tremendous business, and the salesmen—. They don't do any outside work. They do a lot of closing and there's a lot of prospects brought in by advertising.

Now, a salesman there will sell 25 to 30 cars a month. The same salesman at Ferrell-Hicks could work harder and only sell 15 or 20 cars a month because he has to bring in his own business, he has to do more work; and then, if you go to a suburban dealer, the same dealer might sell 10 cars a month because they do no advertising.

Q. What else was said, then, at that time? A. Well, Andy commenced back to me, "We'll work out a plan for me," and naturally, that was—.

Q. Was that the end of the conversation, then? A. Yes, it was.

Q. And was that the full conversation as you remember it? A. As I remember it.

Q. And did you call him into your office on that 356 occasion? A. No, I did not call him in.

Q. Now, was that the last time you had any conversation whatever with Mr. Burns concerning any Union matters of any kind? A. Yes, it is.

* * * * *

379 *Cross-Examination.*

• • • • •

383 Q. At the sales meeting wherein this matter was discussed by you, as you indicated, it was the main point of it—. No. Excuse me. You indicated it was the main point of your sales meeting. Did any salesman protest this action of Mr. Frachalla? A. No.

Q. Prior to the meeting, had any salesman ever come to you and protested against Mr. Frachalla's taking this customer? A. Not to the best of my recollection.

Q. In other words, you are saying that at no time did any salesman at Ferrell-Hicks ever protest to you the fact that Mr. Frachalla came into the new car floor and took a customer? A. Not to the best of my recollection.

• • • • •

385 BERT M. FERRELL was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

• • • • •

Direct Examination.

Q. (By Mr. Grabemann.) What is your business, Mr. Ferrell? A. Automobile business.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet.

386 Q. What capacity are you associated with the Respondent? A. General manager.

• • • • •

387 Q. Now, after Mr. Haggerty was hired, did you say anything to Mr. Burns with reference to Mr. Frachalla's discharge? A. Yes, sir.

Q. Will you tell us, please, what you said to Mr. Burns at

that time? A. Well, I told Andy, I said, "Andy, now,
I fired Tom and let him go and I'm going to put Jack in
388 charge. What do you think about it"? Andy says,
"I'll work for Jack. He's a good man. I'm not going
to work for Tom. I didn't half do my job for Tom."

* * * * *

394 Q. Now, moving ahead, Mr. Ferrell, and directing
your attention now to some days prior to the election
in December, 1961, did Mr. Burns have occasion to see you
at that time with reference to election notices? A. Yes.

Q. And where did you see him at that time? A. Well, we had the notices laying around. I think Andy asked me, says, "Have we got the notices up?" I said, "No, I guess we haven't. We'd better get them up. Let me get them and give them to you and you put them up."

395 Q. Where did this conversation take place? A.
Out on the salesroom floor.

Q. Where did you go then? A. Well, I went into the office and got the posters to put up and hand them to Andy.

Q. And what happened at that point? A. Well, about that time the phone rang.

Q. And what happened next, then, if anything? A. Well, I got quite a chewing out over the phone and—.

Q. What do you mean by a "chewing out"? A. Well, there was a customer that was pretty well disturbed about the way his car had been worked on and he proceeded to really chew me out and bawl me out and evidently tell me I wouldn't—or couldn't run a place of—I didn't have sense enough to run it.

Q. How long did that conversation last? A. Oh, just for a few minutes. Maybe two or three minutes. I don't know. I was almost—really throwed me.

Q. What happened next, then, if anything? A. Well, I went back out and started over with Burns. In the meantime, I walked over to where Andy was and I guess I still

had it on my mind and I said—I said, "Aint no son-of-a-bitch going to tell me how to run my business." He
396 said, "What you mean? Me?" I said, "No, Andy. You know that." He said, "Oh, we're talking about two different things."

• • • • •

397 A. Yes, it was. I said, "Well, business is getting pretty good." I said, "Guess we'll have to have a Christmas party" or "I'll take you guys that don't want to go to the Christmas party—I'll take you duck hunting with me" and they said—I said, "Take a vote on it,"
398 so they took a vote on it and decided they'd have a Christmas party. So, then, we scouted around and found out where we could have the Christmas party and we found out we could have it at the Mangram Chateau.

Q. And did you contact Mangram's or did someone else? A. No, I contacted them.

Q. You did? A. Yes.

Q. And what did they tell you? A. They had two dates open. They had one date before Christmas and one date after Christmas.

Q. So, after you were told that, what happened next, if anything? A. Well, I went to the salesmen and asked them—told them the dates we could have it and told them to take a vote on it and see which day they wanted it, so they voted to take it before Christmas.

Q. And the party then was held before Christmas, is that right? A. Yes, sir.

• • • • •

417 Q. Was a letter sent out from your firm on your stationery of your firm by special delivery to the salesmen's homes asking them to vote against the Union?
A. No, sir.

418 Q. You are positive that no such letter was sent?
A. Not to vote against the Union.

Q. Oh, there was a letter sent? A. There was a letter but not about no union. It was inviting them to the party.

Q. And you are testifying now that in this letter the word or the name of the Union was never mentioned? A. About not voting for no union or nothing else about that.

Q. Was there anything in the Union—letter about the Union? A. I don't remember what that letter said but it wasn't against no union.

Q. Didn't you send the letter out? A. I don't remember what the letter said. I know we sent a letter out but—.

Q. Didn't this letter arrive at their home about two days before the Union election? A. I don't know about that.

Q. Didn't you send the letter out special delivery? A. I may have sent the letter out but I don't know the positive dates on it, honest.

Q. I won't pin you to any positive date. A. We sent a letter out. We sent the letter out to the salesmen's
419 wives so the wives would get on the salesmen and make the sell more cars to have this party is what we was really up to.

Q. Didn't you testify about that, the salesmen took a vote in the shop as to when the party would be? A. That's right.

* * * * *

424 Q. (By Mr. Lennon.) Did you have a conversation with Bert Chambers regarding the Union prior to the election? A. I think so.

Q. Could you tell us what you—? Bert Chambers was then a salesman for your organization? A. Right.

Q. Would you tell us what you said to Mr. Bert Chambers about the Union at that time? A. Bert Chambers had his conversation with me.

Q. All right, sir. Would you tell us about the conversation Mr. Chambers had with you? A. Bert Chambers

asked me how the thing was going. I told him everything was going all right, as far as I know. Why? He said, "Well, how's the Union going?" "As far as I know, it's all right with me. Like I tell you, Bert, it doesn't make one difference to me which way the Union goes. One way or other."

* * * * *

430 *Direct Examination.*

Q. (By Mr. Lennon.) Mr. Burns, calling your attention to approximately two or three days before the representation election at Ferrell-Hicks, did you have occasion to see a letter signed by Mr. Ferrell? A. Yes, sir. I did.

Q. Do you know how this letter was mailed? A. This letter was mailed special delivery, on the envelope there was special delivery stamps. I think it was about 28 cents worth of stamps, and this brought to my attention it was marked "special delivery."

Q. Did you read this letter? A. Yes, sir. I did.

Q. Would you tell us, to the best of your recollection, what you recall reading in this letter?

Mr. Grabemann: Objection.

Trial Examiner: What's the objection.

Mr. Grabemann: The objection is that the best evidence is the letter itself.

Trial Examiner: Did you get a copy of the letter?

The Witness: No, sir.

Trial Examiner: Where did you read it?

The Witness: The salesmen showed it to me.

431 Trial Examiner: Well, can you produce a copy of it?

Mr. Grabemann: I've called Mrs. Klinnicke and she tells me that there aren't any copies in the file. She's looked in the file and she doesn't have a copy.

Trial Examiner: Where's the best evidence?

Mr. Grabemann: The best evidence is the letter.

Trial Examiner: But where is it. He says he doesn't have it. You say you don't have it.

Mr. Grabemann: That's right. I don't have it.

Trial Examiner: And he never had it.

Mr. Grabemann: I can't help that, but it hasn't been shown that there aren't some letters around somewhere, for one thing, and it seems to me—.

Trial Examiner: You say you don't have a copy of it, correct?

Mr. Grabemann: I don't have a copy, no. I've asked Mrs. Klinnicke. She tells me she doesn't have a copy.

Trial Examiner: That means the Respondent doesn't have a copy.

Mr. Grabemann: I guess so.

Trial Examiner: All right. You may answer.

Mr. Grabemann: Objection once again.

The Witness: The thing that I remember most and 432 it was—.

Trial Examiner: Well, give us your recollection of what the entire letter said. Your best recollection of what the whole letter said.

The Witness: It related to a marriage, referring to salesmen and the Company as a marriage and they couldn't afford to have a third party coming in to break up this marriage. This is what really stuck in my mind mostly in that letter.

Mr. Grabemann: I object again, Mr. Examiner, and move the answer be stricken.

Trial Examiner: You say you never actually got a copy of this letter in your possession?

The Witness: No, sir.

Trial Examiner: Was one delivered to your house?

The Witness: No, sir. They made sure I didn't get one.

Mr. Grabemann: I object to that, too, and move it be stricken.

Trial Examiner: That may be stricken, but the rest of the testimony may stand.

Mr. Lennon: Are you through, sir?

Trial Examiner: Yes.

Q. (By Mr. Lennon.) Was this letter signed by
433 Mr. Bert Ferrell? A. Yes, sir.

Mr. Grabemann: Objection again.

Q. (By Mr. Lennon.) Can you recall anything else, any other statements, that were made in this letter?

Mr. Grabemann: Objection. I object to this entire line of questioning, Mr. Examiner. It hasn't been shown that there aren't letters extent, and the best evidence is clearly the proper rule to be applied here.

Mr. McCabe: The best evidence is in the possession of the Respondent and should be.

Trial Examiner: Normally, I would expect Respondent to have a copy of that letter, wouldn't you?

Mr. Grabemann: No, not particularly.

Trial Examiner: I see. All right. Objection overruled.

Mr. Lennon: Could we have the last question read now so the witness can—?

(Question read.)

The Witness: Since I was interested—.

Q. (By Mr. Lennon.) Just tell us—.

Mr. Grabemann: Objection.

The Witness: The only one other thing I remember
434 mainly on that letter that the signature contained Mr. Ferrell in green ink, which he used on many occasions in signing checks and things that I noticed his signature on it and I recognized the signature "Bert Ferrell."

Mr. Grabemann: I object to that and move the entire answer be stricken. That's clearly inadmissible.

Trial Examiner: Motion denied.

Mr. Grabemann: He's not a handwriting expert, Mr. Examiner.

Trial Examiner: You can cross-examine him. Yes, go ahead.

Q. (By Mr. Lennon.) Do you recall anything further that was said in this letter? A. I'm sorry. I just can't remember. The main pitch of the letter was they couldn't afford to bust up this beautiful marriage between the salesmen and the Company due to the fact that a third party would be involved.

Q. Is this all you recall?

Mr. Grabemann: Objection to the—.

Mr. Lennon: Come on, now.

Trial Examiner: You have a standing objection as to foundation, yes.

The Witness: It was referring to the coming elec-
435 tion. They couldn't afford to have this third party. That was about all I remember in the letter.

Q. (By Mr. Lennon.) Did the letter, to the best of your recollection, say anything about the salesmen coming to a party? A. Not that I recall. No, sir. It didn't mention anything about the party that I recall.

* * * * *

EXCERPT FROM LETTER OF RICHARD B. SIMON, COMPLIANCE OFFICER DATED DECEMBER 22, 1964.

NATIONAL LABOR RELATIONS BOARD
Thirteenth Region

881 U. S. Courthouse and Federal Office Building
219 South Dearborn Street, Chicago, Illinois 60604
Telephone 828-7572

December 22, 1964

Karl W. Grabemann, Esq.
Turner, Hunt and Woolley
134 South La Salle Street
Chicago, Illinois 60603

Re: Ferrell-Hicks Chevrolet, Inc.
Case No. 13-CA-4886

Dear Mr. Grabemann:

* * * * *

The exact backpay liability cannot be determined without examining the Company's payroll records, and an affidavit from Mr. Burinskas, and further investigation. However, it appears that his gross earnings at the time of his discharge were about $12,000 a year, and that his only interim earnings since his discharge were between $4,000 and $5,000 for the year 1964, representing probable earnings from self-employment.

Your contention that Mr. Burinskas is not entitled to any backpay, at least prior to the date of the issuance of the Board's Supplemental Decision and Order, has been carefully considered. It is noted that the case you cite, *Fibreboard Paper Products Corp.*, 138 NLRB 550 (footnote 21),

51 LRRM 1101, has a different factual situation. In that case, the Board reversed itself pursuant to a petition for reconsideration filed by the charging union; in the instant case, the Board's reconsideration of the case came about as a result of a remand from the Circuit Court of Appeals. Furthermore, the Board, in the instant case, makes no reference as to whether or not backpay should be tolled for any period.

* * * * *

In light of the above, I would appreciate your advice, by January 8, 1965, as to whether the Company will comply with the Supplemental Decision and Order.

Very truly yours,

Richard B. Simon,
Compliance Officer.

EXCERPT OF LETTER TO MARCEL MALLET-PREVOST, ESQ., DATED APRIL 7, 1965.

April 7, 1965

Marcel Mallet-Prevost, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20507

Dear Mr. Mallet-Prevost:

* * * * * *

While I am engaged in the process of writing you, which I would not have done but for the enclosed "motion," I wish to express my further irritation in connection with the handling by your office of the prehearing conference stipulation in the Ferrell-Hicks case. There was complete agreement regarding the issues to be presented to the Court some days prior to April 6, 1965, the last date for filing such a stipulation with the Court. In this posture, I was never advised that your office had changed its position regarding one of these issues until, unfortunately, I received your revised draft of a prehearing conference stipulation by mail on April 5. At that late hour, in order to obviate the needless expenditure of more money through phone calls, travel to Washington, and so forth, I frankly feel that my client was "shot-gunned" into entering into a stipulation that is different than the one that might have evolved under more favorable circumstances.

Very truly yours,

Karl W. Grabemann.

KWG/jk
Enclosure

EXCERPT FROM THE STATEMENT OF EXCEPTIONS FILED WITH THE BOARD BY FERRELL-HICKS CHEVROLET, INC.

* * * * *

(63) The Respondent excepts to "the remedy" of the Trial Examiner, and the failure of the Examiner to conclude that no remedy is needed or warranted. . . .

* * * * *

(65) The Respondent excepts to each and every portion of the Recommended Order contained in the Intermediate Report. . . .

* * * * *

BRIEF FOR PETITIONER.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 19,222

FERRELL-HICKS CHEVROLET, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

FREDERICK W. TURNER, JR.,
KARL W. GRABEMANN,
134 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

STATEMENT OF QUESTIONS PRESENTED.

As set forth in the prehearing conference stipulation, the questions from the viewpoint of the petitioner are:

1. Whether the mandate of this Court on remand permitted the Board to set aside its original decision and order dismissing the complaint and to issue a supplemental decision and order finding a violation of Section 8(a)(3) and (1) of the Act.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employee Andrew Burinskas.

3. Whether the Board's remedy is appropriate in the event this Court determines that the Board's supplemental decision and order should be enforced.

INDEX.

AUTHORITIES CITED.

Cases.

*Authorities chiefly relied upon.

* Authorities chiefly relied upon.

Statute.

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* Authorities chiefly relied upon.

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BRIEF FOR PETITIONER.

JURISDICTIONAL STATEMENT.

This case is before the Court on the petition of Ferrell-Hicks Chevrolet, Inc. (herein called petitioner), to review and set aside a "final order" of the National Labor Relations Board. The Board has filed a cross-petition for enforcement of its order. Petitioner is aggrieved by such order inasmuch as it directs petitioner to reinstate Andrew Burinskas (also known as "Andy Burns"), with back pay, to his former position of employment with the petitioner. This Court has jurisdiction under Section 10(c) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. §§ 151 *et seq.*).[1]

1. Hereinafter called the Act. The relevant portions of the Act are set out in an Appendix to this brief. See pp. 49-50, *infra*.

STATEMENT OF THE CASE.

Briefly, the Board originally dismissed the complaint against petitioner on the ground that the evidence had failed to establish that petitioner's discharge of Burns violated the Act. 142 NLRB 154. Burns then petitioned this Court for review of the Board's order. *Burinskas* v. *NLRB* (C. A. D. C. No. 18,054). On review, this Court remanded the case to the Board on January 8, 1964 "for reconsideration of [its] Decision with a view to its clarification." The Board's response to the Court's request for clarification was to set aside its original decision and order and issue a supplemental decision and order finding that petitioner had now violated Section 8(a)(3) and (1) of the Act by discharging Burns. 149 NLRB No. 130. The essential underlying facts are as follows:

I. EVENTS PRECEDING BURNS' DISCHARGE.

A. Burns' Union Activity.

Burns was hired by petitioner as an automobile salesman in September 1955. In July 1961 he became a member of the Automobile Salesmen's Union of Chicago and Vicinity (hereafter called the Union), and during the same month became chairman of its organizing committee (J. A. (1) 7).[2] In this capacity, he solicited membership, dis-

2. Pursuant to the prehearing conference stipulation, the complete joint appendix in this case consists of two volumes, namely: (1) the joint appendix in *Burinskas* v. *NLRB*, No. 18,054, which the parties are permitted to use as part of the joint appendix in this case; and (2) the joint appendix in the instant case, No. 19,222.

"J. A. (1)" will be used herein to refer to matters appearing in the joint appendix in No. 18,054. All other

tributed literature, and filed petitions with the Board seeking representation elections among the salesmen of a number of Chicago area automobile dealers, including the petitioner. At the consolidated hearing held on these petitions, Burns represented the Union and gave testimony (J. A. (1)7).

In October 1961, Burns one day proceeded to explain to Jack Haggerty, petitioner's new car sales manager, the purpose of the Union. After Burns had finished, Haggerty stated (Tr. 347-349):

> Andy, if you think the Union is what you want, if you think it's for the men and the betterment of the men and you honestly believe this to be true, you are bound morally to follow it up and to stay with it. You never will feel right the rest of your life if you didn't do it.

On another occasion, Burns speculated that Haggerty should be in favor of the Union in view of his close friendship with Tom Haggerty, an officer of a Teamster local in Chicago. "Well, certainly, Andy," replied Haggerty, "I have nothing against the Union." Following further conversation, Haggerty again assured Burns that he had "nothing against the Union" (Tr. 349-350).

On November 27, 1961, the Board's local Regional Director ordered an election to be held among petitioner's salesmen. The election was subsequently scheduled for December 20, 1961 (J. A. (1) 7).

During the election held at petitioner's place of business on December 20, Burns, acting as the Union's observer,

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references herein to the record are found in the joint appendix in No. 19,222, in connection with which the following will be used in referring to pages of the original record: "S. D. & O." for the Board's Supplemental Decision and Order; "Notice" for the Board's Notice to Show Cause; "Ans. to Notice" for petitioner's Answer to the Board's Notice to Show Cause; "Tr." for the transcript of testimony.

saw Bert Ferrell, petitioner's president, in the area where the balloting was taking place. He then exclaimed in the presence of several employees: "Get that son of a bitch out of here"[3] (Tr. 299-302; J. A. (1) 9).

The Union was unsuccessful in the election held at petitioner's place of business, but was certified by the Board as bargaining representative at two other dealerships (J. A. (1) 8). No objections to conduct affecting the results of the election were filed, nor were there charges of unfair labor practices concerning any circumstances surrounding it (J. A. (1) 24).

Shortly after the election, Burns sent a bulletin entitled, "Keep the Ball Rolling" to all petitioner's salesmen, urging continued effort on behalf of the Union. Haggerty, seeing a copy of this after hearing from another salesman that Burns was going to give up the Union, mentioned to Burns that he thought he was through with the Union. After Burns explained that he was going to continue his efforts on behalf of the Union, Haggerty commented, "Well fine" (J. A. (1) 9-10; Tr. 352-353).

In January 1962, Burns circulated among petitioner's salesmen copies of the Union's wage proposals to be submitted to the dealers at which it was certified. After seeing one of these, Haggerty and Burns discussed generally the economic proposals which Burns and the Union intended to submit to other Chicago area dealers. This was the last occasion before Burns' discharge that union matters of any kind were discussed (Tr. 352-353).

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3. Petitioner's bookkeeper, Isabel Laban, was one of the employees who heard Burns' profane remark about Ferrell. She told Alma Klinnicke, petitioner's office manager about it immediately after the election, and the latter related it to Haggerty. But Laban declined to tell Ferrell himself for the reason that she did not have "the heart" to do so (Tr. 304, 312-314).

B. Events Leading to Burns' Discharge.

On March 7, 1962, pursuant to Haggerty's suggestion (Tr. 332-333), Tom Frachalla was re-employed by petitioner as used car sales manager (J. A. (1) 10). Frachalla had been new car sales manager from July 1960 to May 1961, when petitioner had discharged him (J. A. (1) 39). Following his discharge by petitioner, and prior to his rehire, Frachalla acquired reason to believe that Burns had played a role in his discharge. Thus, during the period between employment with the petitioner, Frachalla worked at Southwest Chevrolet in Chicago (J. A. (1) 39), where a number of salesmen were employed who had worked for petitioner at the same time as had Frachalla (J. A. (1) 40). One of these salesmen, Joe Wentz, several times told Frachalla that "on many occasions . . . Burns would get together with two or three salesmen and pick apart the job [Frachalla] was doing" (J. A. (1) 40-41). Another, Ross Barcelona, apologized to Frachalla "for being what he termed jealous because Frachalla had been over-attentive to another salesman named Joe Wentz, and . . . the reason the jealousy was aroused was the fact that Andy Burns would remind Barcelona of any favor Andy thought [Frachalla] was passing to Joe Wentz and [Barcelona] objected to it" (J. A. (1) 40). Furthermore, Burns, who visited Southwest Chevrolet in the course of his organizing activities, said to Frachalla: "Did you know that Mr. Ferrell let you go to suit me?" (Tr. 185-187).

Shortly after Frachalla's re-employment with the petitioner, in the course of a conversation with Frachalla, Burns said of Haggerty, "Watch out for [him]. When he smiles, it's with his teeth, but you look into his eyes and you [can] see he's not sincere." Burns further observed that Haggerty was trying to "start the Haggerty dynasty

at Ferrell-Hicks'"[4] (Tr. 196-198; J. A. (1) 12, n. 7). This conversation was reported to Haggerty the same day by Frachalla, who considered Burns' remarks "disrespectful" and made for the reason of "influencing" him against Haggerty (Tr. 199; J. A. (1) 12, n. 7).

About a week later, Frachalla noticed that Burns was not driving his own automobile, but a used one owned by petitioner. Frachalla reminded Burns that this was contrary to petitioner's policy. Burns said he would see Ferrell "about that," and when Burns did so, Ferrell extended permission to Burns to use petitioner's automobile until a new one on order by Burns was delivered to him. Immediately thereafter, Burns remarked to Frachalla: "See that. Back Ferrell into a corner and watch him squirm" (Tr. 200-202). Thereafter, Frachalla reported Burns' remark to Ferrell, since Frachalla considered it "disrespectful to the man that was employing us" (Tr. 206).

On May 7, 1962, a customer in petitioner's showroom went to one of the salesmen then present and complained that other salesmen in the showroom were standing around talking among themselves and ignoring the customer, who was seeking information. The salesman took the customer to Haggerty and Frachalla, who heard the customer complain. Haggerty assured the customer that he appreciated his complaint and that he would "try and remedy it" (Tr. 274-279). Later the same day, Frachalla noticed the salesmen again talking among themselves, this time ignoring a young couple that had entered the showroom. Frachalla therefore greeted the couple and "within 30 minutes from

4. Burns had earlier told Haggerty, after he had been promoted to new car sales manager following Frachalla's dismissal from that position: "Jack, I can work for you. I couldn't work for Frachalla but I can work for you. . . ." (Tr. 331-332.) About the same time, Burns told Bert Ferrell: "I'll work for Jack Haggerty. He's a good man" (Tr. 387-388).

the time they entered the door [the couple and Frachalla], were changing the plates to make delivery" of a used car (Tr. 202-204; J. A. (1) 10-11).

At a morning sales meeting two days later, Haggerty, by referring to the sale made by Frachalla on May 7, sought to demonstrate to the salesmen that they ought not to classify a person who walked into the showroom as a non-buyer solely on the basis of his or her appearance. In discussing the sale made by Frachalla, Burns shouted loudly: "That's a lot of s - - t. He is just trying to make an issue out of it." All the salesmen broke out laughing, which, Haggerty testified, "ruined the whole effect of his talk" (Tr. 270-273, 292-293, 333-335; J. A. (1) 11).

Following the sales meeting, Burns later that same day told Haggerty: "Jack, Tom Frachalla is out to get your job. I'm warning you. * * * Believe me he is, Jack" (Tr. 335-337; J.A. (1)11).

Around 9:00 p.m. that evening, Frachalla, whose day off it had been, came to petitioner's place of business to see if everything was in order. He met Haggerty and asked how everything had gone that day. Haggerty told him that his sale of May 7 "got kicked around" and that Andy Burns told him to "look out" for Frachalla. When Frachalla pressed Haggerty for more information, Haggerty told him he was leaving to see a customer and asked Frachalla to stop at his home later that evening. Frachalla arrived at Haggerty's home about 10:00 p.m. and Haggerty arrived an hour later (J.A.(1)12).

Haggerty began the discussion by telling Frachalla about that day's events—Burns' conduct at the meeting and his warning to him that Frachalla "was out to get [his] job." The two then discussed the prior incidents involving Burns —his statement to Frachalla in March that Haggerty was insincere and was trying to start a dynasty at petitioner's

place of business; his calling Ferrell a "son of a bitch" and bragging that he had "backed Ferrell into a corner." In light of these incidents, plus the part that Frachalla believed Burns had played in causing him to lose his job as petitioner's new car sales manager, the two managers decided to discharge Burns the next day, May 10, which they did (Tr. 225-228, 337-339; J.A. (1)12-13).

II. THE BOARD'S ORIGINAL DECISION AND ORDER.

In its decision and order dated April 22, 1963, a majority of the Board concluded that the General Counsel had failed to establish by a preponderance of the evidence that petitioner had violated Section 8(a)(3) and (1) of the Act by discharging Burns. Accordingly, the Board ordered the complaint dismissed[5] (J. A. (1) 26).

In context with the "prime" issue in the case, whether petitioner had discharged Burns for his union activities or for what petitioner regarded as good cause, the Board rejected the conclusion reached in an Intermediate Report by a Trial Examiner that Burns was terminated for his union activity (J. A. (1) 23-24). The Board noted that the Examiner had credited Burns' testimony in many respects while discrediting petitioner's witnesses who had testified otherwise. Even though the Board accepted the Examiner's resolutions of credibility "based on demeanor," it did not consider itself required thereby also to adopt his conclusion that Burns was discharged because of petitioner's alleged opposition to his activities on behalf of the Union (J. A. (1) 23-24).

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5. Tht Board majority was comprised of Board Members Rogers and Leedom, who, with Chairman McCulloch, constituted the three-member panel deciding the case. Chairman McCulloch's dissent stated only that he would adopt the Trial Examiner's Report (J. A. (1) 26-27).

The Board reasoned that whether the factors which motivated petitioner to discharge Burns were pretexts depended basically on a judgment that petitioner resented or feared Burns' activities on behalf of the Union (J. A. (1) 26). While the Trial Examiner had concluded that petitioner had discharged Burns as soon as possible because Haggerty had decided that Burns intended to continue working to organize petitioner's salesmen (J. A. (1) 17-18), the Board concluded that the Examiner's inference to this effect was, under all the circumstances, "mere speculation." Consequently, the Board concluded that the General Counsel had failed to establish by a preponderance of the evidence that Burns' discharge was violative of the Act (J. A. (1) 26).

III. THIS COURT'S ORDER OF REMAND ON REVIEW AND THE BOARD'S RESPONSE THERETO.

Following the issuance of the Board's original decision and order, Burns petitioned this Court for review of the order of dismissal. *Burinskas* v. *NLRB* (C. A. D. C. No. 18,054). After oral argument on February 8, 1964, the Court:

> . . . having had difficulty in apprehending the basis for the Board's Order by reason of ambiguities in its Decision deriving from the Board's treatment of the Examiner's findings with respect to the credibility of certain witnesses for the employer and uncertainty as to the extent to which the Board rejected the Examiner's inferences from the evidence found credible,
>
> . . . ORDERED . . . that [the case] be remanded to the Board for reconsideration of the Decision with a view to its clarification. . . .

In its Per Curiam order, the Court also directed that full opportunity be afforded all parties to be heard upon any action to be taken by the Board as a result of the remand.

In response to the Court's order of remand for "clarification," a Board majority issued a notice to show cause on July 28, 1964 proposing to issue an order setting aside the Board's original order and adopting the findings, conclusions and recommendations of the Trial Examiner[6] (Notice 1).

However, in a dissent to the majority's notice, Member Leedom disagreed with the proposed action to set aside the Board's original decision and order. He stated at the outset that it was "improper" for the Board, in context with the Court's remand "for reconsideration of the Decision *with a view to its clarification*," to reverse on its own motion its original decision. In Member Leedom's view, the Board, having accepted the Court's remand, was mandated to take action only with respect to the clarification of its decision (Notice 2).

On the merits, Member Leedom believed the conclusion in the Board's original decision, that petitioner had discharged Burns because he had been disrespectful to supervisors and because he had attempted to create dissension between supervisors Haggerty and Frachalla, "amply supported by the record" (Notice 2). Thus, he would have reaffirmed the Board's original finding, with the following clarification, requested by this Court, regarding the Board's treatment of the Examiner's credibility findings (Notice 2):

> The Trial Examiner, discrediting the testimony of several of the petitioner's witnesses, including the testimony of Frachalla and Haggerty that they had discharged Burns because of his disrespectful remarks

6. The Board majority was comprised of Chairman McCulloch and Members Fanning and Brown. Member Rogers, who had participated in the original decision, did not participate in connection with the Board's notice inasmuch as he was no longer a Board member after his term of office had expired August 28, 1963 (cf. S. D. & O. 1).

> and because of his attempts to create dissension, found that Burns had been discharged because he had engaged in union activity. . . . The Board accepted the . . . Examiner's resolutions based on credibility but nonetheless reversed the . . . Examiner and found that the petitioner did not violate Section 8(a)(3). The Board thereby intended only to accept the . . . Examiner's credibility resolutions of testimonial conflicts as to the underlying facts [fn. omitted]. It was not accepting his rejection on grounds of credibilty of the testimony by Frachalla and Haggerty as to their subjective reasons for the discharge nor was it accepting his conclusionary finding that Burns' discharge was for discriminatory reasons. The determination that Burns was discharged for discriminatory reasons is a legal conclusion which the Board must make on the basis of all the facts in the record. In deciding such issue, the . . . Examiner's conclusions are not entitled to special weight[7].
>
> In light of the undisputed facts that Burns had acted disrespectfully and had attempted to create dissension between his superiors, the further fact the record was devoid of conduct violative of 8(a)(1), and the Board's view that petitioner was not "strongly opposed to the Union," the Board found that Burns was discharged for cause. I would adhere to that conclusion. . . .

In response to the Board's notice, petitioner protested the Board's proposed action by filing an answer thereto on September 9, 1964 (Ans. to Notice 1-6).

On December 9, 1964, a Board majority issued a supplementary decision and order setting aside its original decision and order and adopting the Trial Examiner's find-

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7. "[Member Leedom:] I specifically disagree with the statement of the majority herein that the Board in accepting the . . . Examiner's resolutions of credibility based on the demeanor of witnesses . . . should also have accepted the inferences which the . . . Examiner drew from the facts as he found them."

ings, conclusions and recommendations[8] (S. D. & O. 4). Among the Examiner's recommendations was that petitioner reinstate Burns to its employment and pay him backpay from the date of his discharge up to the date of reinstatement (J. A. (1) 18-20).

STATUTES INVOLVED.

The pertinent sections of the Act are set out in the Appendix, pp. 49-50, *infra*.

STATEMENT OF POINTS.

1. The scope of the Court's mandate and its acceptance by the Board on remand did not permit the Board to take action contrary thereto.

2. The Board's finding that petitioner violated Section 8(a)(3) and (1) of the Act by discharging Andy Burns is not supported by substantial evidence on the record as a whole.

3. The Board's remedy is inappropriate in the event the Court determines that the Board's supplemental decision and order should be enforced.

8. The substance of Member Leedom's dissent in the Board's earlier notice is reflected in footnote 2 of the Board's supplemental decision and order (S. D. & O. 2).

SUMMARY OF ARGUMENT.

1. The Board improperly set aside "its" original decision and order herein upon a remand from this Court "for reconsideration of the Decision with a view to its clarification." Inasmuch as the Board's reversal is attributable to a *change* in the membership of the Board from the time of the issuance of the original decision, the excuses advanced by the present Board majority to justify its disobedience to the Court's mandate are basically pretexts to permit the present Board majority to decide the instant case on a *de novo* basis and effect a reversal of the result in the original decision. In this posture the Board's action is contrary to "its" stated position that changes in Board membership do not constitute a basis for the reconsideration or reversal of matters previously adjudicated. Cf. *Wagner Iron Works*, 108 NLRB 1236, 1239. For this reason, and also because the Board *accepted* the Court's remand in the context of having urged before the Court that it be mandated to "clarify" the original decision, it would now appear contrary to equitable principles for the Board to seek and obtain enforcement of its supplemental decision and order, wilfully conceived, as it was, outside the scope of the Court's mandate.

2. In any event, the Board's conclusion that petitioner discharged Burns because of his union activities is not supported by substantial evidence considered on the record as a whole. Burns, prior to the events of May 9, 1962: (1) Had called the Company's president, Ferrell, a "son of a bitch"; (2) had bragged to Frachalla how he had "backed" Ferrell "into a corner"; (3) had told Frachalla to "watch out" for Haggerty while accusing

him of duplicity; and (4) was believed by Frachalla to have caused his earlier discharge as new car sales manager by stirring up dissatisfaction with Frachalla's performance of duties. On May 9, 1962, the day on which Haggerty and Frachalla decided to discharge Burns, he had by an impertinent remark about Frachalla's performance of duties, caused the disruption of a sales meeting conducted by Haggerty. Also, on the same day, Burns warned Haggerty to "watch out" for Frachalla, that he was "out to get [his] job." Under these circumstances, substantial evidence shows that Burns was discharged because he was disrespectful to his supervisors and because it was felt he had attempted to create dissension between supervisors Haggerty and Frachalla.

The Trial Examiner's findings and conclusions, adopted in their entirety by the Board, manifest a failure to consider the record as a whole. The Examiner's decision is based almost exclusively on the uncorroborated and unsupported self-serving testimony of the alleged discriminatee, Burns, the *only* witness to appear for the General Counsel, whose testimony was impeached in several significant respects. Nonetheless, the Examiner based almost all his findings and conclusions on such testimony, while ignoring, distorting or misstating substantial evidence which either refuted his findings or failed to support his ultimate inference of discrimination. Under these circumstances, *inter alia*, the Examiner's credibility findings are entitled to little, if any, weight.

The factors relied upon by the Trial Examiner to support his inference of discriminatory motivation are unsupported by, and contrary to, the whole record. The fact that Haggerty and Frachalla's decision to discharge Burns was made at a meeting on the evening of May 9, outside normal business hours, is explained by the serious

nature of Burns' misconduct and the fact that Frachalla, who was off duty on May 9, did not learn of Burns' misconduct until 9 o'clock that evening. The Examiner's finding that Burns and other salesmen had remonstrated with Haggerty on May 9 concerning the sale of an automobile by Frachalla on May 7, thus establishing in part the alleged reason for Burns' termination, is specifically contrary to the record. While Burns' discharge followed by about a week an alleged conversation with Haggerty in which Burns indicated his continued interest in union activities, Haggerty had never been in any doubt as to Burns' continued union adherence. In fact, Haggerty several times encouraged Burns to engage in and persist in his efforts on behalf of the Union, even after the Union lost in the Board conducted election in December, 1961.

3. The Board's remedy is inappropriate in the event that this Court determines that the Board's supplemental order should be enforced. Under the circumstances herein, where the Board originally dismissed the complaint against petitioner and then on its own motion reversed that dismissal incident to a remand from this Court for "clarification" of the Board's original decision, the Board's present order awarding Burns full backpay constitutes a clear abuse of discretion. This portion of the Board's order should be modified, for it is inequitable and punitive. Further, that portion of the Board's order requiring petitioner to reinstate Burns should not be enforced for the reason that his demonstrated misconduct properly precludes "renewal of a relationship that bids ill for all concerned." Cf. *NLRB* v. *National Furniture Mfg. Co.*, 315 F. 2d 280, 287.

ARGUMENT.

I. THE SCOPE OF THE COURT'S MANDATE AND ITS ACCEPTANCE BY THE BOARD ON REMAND DID NOT PERMIT THE BOARD TO TAKE ACTION CONTRARY THERETO.

In its Per Curiam order of January 8, 1964, the original decision and order of the Board was remanded by this Court "for reconsideration of the Decision *with a view to its clarification*" (emphasis added). The mandate contained in the Court's order to remand was clear and unequivocal—yet the Board appears clearly to have ignored it. Instead of supplying the clarification requested by this Court, the Board *sua sponte* elected to set aside its original decision and order dismissing the complaint against petitioner while finding in a so-called "supplemental decision" that petitioner had engaged in unlawful conduct by discharging Burns. We submit that the scope of the Court's mandate did not permit the Board to fashion such a result, for it was mandated to take action *only* with respect to the clarification of its *original* decision.

The Court's remand herein followed oral argument before the Court during which Board counsel urged that the Board's decision be remanded "for clarification" if the Court experienced difficulty with the Board's treatment therein of the credibility findings of the Trial Examiner. Inasmuch as the Court acknowledged in its remand order that it had experienced such difficulty, the remand to the Board was apparently made for the *very purpose* urged before the Court by the Board. Having accepted the Court's remand in this posture, we submit that it is now patently inequitable and unconscionable for the Board to

respond by setting aside its original decision in the guise of acting within the scope of the Court's mandate.[9]

The Board seeks to defend its delinquency in disobeying the Court's mandate by viewing "the remand as encompassing a full reconsideration of its original decision" (S. D. & O. 3). In adopting this view, the Board has completely ignored the clear and unequivocal language in the Court's order to remand, which transferred this case back "to the Board for reconsideration of its Decision *with a view to its clarification.*" (Emphasis added.) Furthermore, the Board's view ignores the fact that its own counsel urged this Court to remand for clarification, only. Under all the circumstances herein, and particularly for the reason that the Board's interpretation of the Court's mandate is so transparently tortured and unrealistic, we submit there can be little doubt regarding the Board's motive in advancing it. Plainly, the Board's indicated view of the Court's mandate is designed to excuse the Board's delinquency in wilfully and knowingly acting outside the scope of that mandate when it reversed its original decision on its *own* motion.

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9. The Board, of course, need not have accepted the Court's remand if it found the mandate therein objectionable. In that instance, the Board should properly have appealed the Court's remand. But an appeal was not taken herein. By accepting the Court's remand while patently fashioning a result wholly at odds with the mandate in the Court's order, the Board has engaged in conduct contrary to that adopted in other cases. See, *e.g.*, *American Federation of Television and Radio Artists, AFL-CIO*, 135 NLRB 297, and 133 NLRB 1736; *H. N. Thayer Co.*, 115 NLRB 1591. In the latter case, the Board specifically acknowledged, at page 1595, that the views of the court of appeals found in its mandate on remand (213 F. 2d 748 (C. A. 1)) *must* control the disposition of the case, even though the Board might not agree with the court's treatment of the case.

The Board seeks further to defend its delinquency in declining to adhere to the Court's mandate by stating an alternative position to excuse reversal of its original decision (S. D. & O. 3). The substance of its alternative position makes it manifest that the Board's disobedience to the mandate of this Court was plainly wilful. Thus, in its alternative, the Board has dropped any pretense that the Court's mandate permitted it to reverse its original decision, for it is inherent in that alternative that the Board knew and realized that the scope of the Court's remand was limited to "clarification" of its original decision. Nevertheless, the Board would excuse its disobedience to the Court's mandate by confessing "error" in its original decision, the "rectification" of which was allegedly justified and required "by the policies of the Act"[10] (S. D. & O. 3).

To assess the Board's alternative position in proper perspective, it should be noted preliminarily that the Board's supplemental decision reversing "its" former holding is the product of three members (Chairman McCulloch, and Members Fanning and Brown), only one of whom participated in the original decision (Chairman McCulloch). Members Fanning and Brown allegedly participated on the remand only because it was not possible to reconstitute

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10. While the Board cites *American Federation of Television and Radio Artists, AFL-CIO*, 135 NLRB 297 and 133 NLRB 1736, as authority for reversal herein of its former holding on remand for clarification (S. D. & O. 3, n. 3), its reliance on that case is wholly misplaced. The facts in the cited case are clearly distinguished from those herein; also, the Board's response to the remand of the court of appeals (285 F. 2d 902 (C. A. 1)) in the cited case was, unlike in the instant case, clearly within the scope of the court's mandate.

the panel which had participated in the original decision.[11] It is apparent, therefore, that it is basically as a consequence of a change in the Board's membership that a Board majority is now able to proclaim that the original decision "was wrong then," and the "error" perpetrated therein required "rectification" (S. D. & O. 3). It appears manifestly obvious, however, that *except* for the *change* in the membership of the Board subsequent to "its" original decision, the present Board majority would not have been provided with an opportunity to reverse *sua sponte* the original decision remanded by the Court for "clarification." In this posture, the Board's action is contrary to "its" stated position that changes in the membership of the Board do not constitute a basis for the reconsideration or reversal of matters previously adjudicated. Cf. *Wagner Iron Works*, 108 NLRB 1236, 1239.

We submit that the assertions by the present Board majority that the original decision was "wrong then," that such "error" now requires "rectification," cannot stand close analysis. The Board's original decision was no more "wrong" initially than at the time of the supplemental decision. What occurred between the period of the original and supplemental decisions so as to make the original decision "wrong" on remand was a *change* in Board membership, which in turn afforded an opportunity for substitution of Board members acting in connection with the instant case. Thus, Members Fanning and Brown, who had nothing whatever to do with the original decision, *initially* came in contact with the instant case only after remand. Accordingly, it is misleading to now allege as the Board majority does, that *its* decision "was wrong *then*" [empha-

11. Member Rogers, who had participated in the original decision with Chairman McCulloch and Member Leedom, left the Board prior to the Court's remand. See footnote 6, *supra*.

sis added], and that "rectification" is now justified and required. We submit, therefore, that it would now be improper to permit the present Board majority to use a remand *for clarification*—which the Board *itself* urged upon this Court—as a means to reverse a result which two of the three members of the present Board had nothing to do with in the first instance. It appears clearly evident that the present Board majority has utilized the Court's remand only as a means to enable it to decide the instant case on a *de novo* basis and to reverse the original Board majority for the reason that the present majority now disagrees with the *result* in the original decision. For the Board to engage in such subterfuge to the prejudice of the petitioner is, we further submit, wholly inequitable and unconscionable.

Under all the circumstances herein, we submit that it would be grossly unfair and unjust for this Court to enforce the Board's supplemental decision and order fashioned, as it was, outside the apparent scope of the Court's mandate on remand. That the Board has inflicted irreparable injury on the petitioner by its action on remand appears obvious unless, of course, the Court reaches the merits of the instant case and concludes that the Board's order lacks the required evidentiary support and should not be enforced for that reason. But a consideration of the merits by this Court would appear unnecessary, for the order of the current Board majority does not properly merit enforcement in any event in the context of its illegitimate inception. This Court should reach the merits, therefore, only if it should somehow conclude that the Board's action in setting aside its original decision was permissible within the scope of the Court's remand.

II. IN ANY EVENT, THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING BURNS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE CONSIDERED ON THE RECORD AS A WHOLE.

A. Introduction.

In its supplemental decision and order, the Board in effect adopted in toto the Trial Examiner's findings of fact, conclusions and recommendations (S. D. & O. 4).[12] The Examiner, however, failed to consider the record as a whole by ignoring, distorting or misstating substantial evidence which contradicted and refuted his findings and conclusions.

The Trial Examiner's decision is based almost exclusively on the wholly uncorroborated, unsupported and self-serving testimony of the alleged discriminatee, Andy Burns, the *only* witness to testify on behalf of the General Counsel at the hearing before the Board. Despite the fact that Burns was a highly interested and prejudiced witness whose testimony was impeached and contradicted in several significant respects, the Examiner nevertheless based almost all of his findings and conclusions upon such testimony, while ignoring, distorting or misstating any other evidence which failed to support his ultimate inference of discriminatory motivation.

B. Substantial Evidence Shows That Burns Was Discharged Because He Was Disrespectful to His Supervisors and Because He Had Attempted to Create Dissension Between Supervisors Haggerty and Frachalla.

In consideration of the evidence relevant to petitioner's reasons for Burns' termination, the Trial Examiner completely ignored undisputed testimony in the record concern-

12. The Examiner's recommendations were amended in an insignificant respect (S. D. & O. 5).

ing certain underlying events. These must be considered in context with the conduct engaged in by Burns which ultimately motivated the petitioner to discharge him on May 10, 1962.

Completely ignored by the Trial Examiner was undisputed testimony to the effect that Frachalla, who had been employed as petitioner's new car sales manager until about a year prior to Burns' discharge, when Frachalla was himself discharged (J. A. (1) 10, 39), had reason to believe that Burns had been primarily responsible for his termination. This belief was based in part on certain conversations engaged in by Frachalla during the period when he was employed by Southwest Chevrolet following his discharge by petitioner, but prior to his re-employment as petitioner's used car sales manager at the suggestion of Jack Haggerty in March 1962 (Tr. 332-333; J. A. (1) 10, 39). Thus, during his interim employment at Southwest, Frachalla was several times told by another Southwest salesman formerly employed by petitioner that Burns had many times prior to Frachalla's termination gotten together with petitioner's other salesmen to "pick apart" Frachalla's performance as new car sales manager (J. A. (1) 40-41). Still another salesman at Southwest, who had also been employed by petitioner as a salesman when Frachalla was the new car sales manager, apologized to Frachalla because of the jealousy which Burns had aroused in him after repeatedly reminding the salesman of favors which Burns thought Frachalla was distributing to another salesman (J. A. (1) 40). But Burns himself contributed to Frachalla's belief that his discharge from petitioner's employment was primarily attributable to him, for Burns one day approached Frachalla at Southwest and inquired whether he was aware that petitioner had discharged him to please Burns (Tr. 185-187).

The foregoing undisputed evidence is part of the back-

ground which the Trial Examiner completely ignored in evaluating the evidence concerning Burns' misconduct, which led ultimately to his termination. But even as to the events motivating the petitioner to finally discharge Burns, the Examiner largely ignored any evidence which failed to support his ultimate inference of discrimination.

In consideration of the conduct leading to Burns' termination, the Trial Examiner did find that Burns had referred to Bert Ferrell as "a son of a bitch" in ordering him away on December 20, 1961, during the course of a Board election at petitioner's place of business (J. A. (1) 9). In so doing, however, the Examiner failed to mention that there was no evidence in the record showing that Ferrell heard Burns, or that Ferrell was ever made aware of Burns' profanity towards him. Furthermore, the Examiner also failed to mention that Burns was not a truthful witness inasmuch as he had indignantly insisted at the hearing that *he* had never called Ferrell "a son of a bitch" (Tr. 130-132).

The Trial Examiner completely ignored other evidence concerning Burns' disrespectful attitude toward Ferrell as found in other remarks made by Burns shortly after Frachalla was re-employed by petitioner. After Frachalla had noticed Burns driving one of petitioner's automobiles, he explained to Burns that this was contrary to petitioner's policy. But Burns responded that he would see "about that," whereupon he went to Ferrell and obtained permission to temporarily use petitioner's car. Immediately thereafter, Burns bragged to Frachalla: "See that. Back [Ferrell] into a corner and watch him squirm" (Tr. 200-202). Frachalla thereafter reported Burns' remarks to Ferrell because Frachalla considered them "disrespectful to the man that was employing us" (Tr. 206).

In consideration of other misconduct which led, finally,

to Burns' termination, the Trial Examiner found that Burns had, in substance, admitted making certain remarks about Haggerty shortly after Frachalla's re-employment with the petitioner. Thus, while the Examiner found that Burns had remarked about Haggerty's lack of sincerity and the fact that Haggerty was trying to start the "Haggerty dynasty" at petitioner's place of business (J. A. (1) 12), the Examiner completely ignored other elements incident to Burns' insulting and disparaging remarks. In full context, Burns had actually warned: "*Watch out for Jack Haggerty.* When he smiles, it's with his teeth, but you can look into his eyes and you [can] see he's not sincere [emphasis added]" (Tr. 196-198). Moreover, the Examiner completely ignored the fact that Frachalla reported Burns' remarks to Haggerty shortly thereafter for the reason that Frachalla considered them "disrespectful" and made for the reason of "influencing" him against Haggerty (Tr. 199), who had been responsible for Frachalla's re-employment with the petitioner. Similarly, the Examiner also completely ignored undisputed testimony that Burns had some months earlier confided to Haggerty that he, in effect, liked Haggerty and could work for him (Tr. 331-332). Finally, the Examiner also completely ignored further undisputed testimony wherein Burns had earlier referred to Haggerty as "a good man" (Tr. 387-388).

In context with other misconduct leading ultimately to Burns' discharge, the Trial Examiner properly found that Frachalla had sold an automobile to a young couple on the evening of Monday, May 7, for the reason that other salesmen then in the showroom had ignored the couple (J. A. (1) 10-11). In so doing, however, the Examiner completely ignored undisputed evidence that Frachalla had earlier witnessed further laxity and inattentiveness among the salesmen that same evening when another customer

complained at some length to Frachalla and Haggerty about being ignored by other salesmen while seeking information. This customer, in Frachalla's presence, was assured by Haggerty that efforts would be made to "try and remedy" the cause of the customer's complaint (Tr. 274-279).

In context with the incident wherein Frachalla had sold an automobile to a young couple, the Trial Examiner found that on May 9, two days later, Haggerty discussed at a regular morning sales meeting the "incident of the previous Monday" (J. A. (1) 11). In consideration of what transpired at this meeting, however, the Examiner failed to evaluate it in the full context of the events of May 7, as indicated in the previous paragraph. Furthermore, regarding the events of the May 9 meeting, the Examiner relied almost exclusively upon the tainted and self-serving testimony of Burns, the *only* witness for the General Counsel, while completely ignoring the testimony of several witnesses who flatly contradicted Burns' unsubstantiated and unsupported testimony. Thus, while the Examiner found, on the basis of Burns' testimony, that Herbert Harrison and other salesmen "all pitching in," had remonstrated with Haggerty because Frachalla had sold an automobile to a customer on May 7 (J. A. (1) 11, 17), Alvin Herman testified that, apart from Haggerty and Burns, *no one else said anything* at the May 9 meeting (Tr. 273-74).[13] Herman, whom the record shows to be simply a salesman (Tr. 269) and, therefore, a disinterested

13. While completely ignoring all testimony from Herman and others impeaching Burns, the Examiner did credit Herman in one particular (J. A. (1) 11, n. 5). This illogical action on the part of the Examiner is easily and logically explained, however, within the framework of petitioner's contention that the Examiner almost invariably credited petitioner's witnesses *only* when their testimony lent support, as he saw it, for his ultimate inference of discrimination.

and impartial witness, thereby corroborated and supported Haggerty's testimony that no salesman at any time had ever protested to Haggerty the sale made by Frachalla on May 7 (Tr. 383). Similarly, Ferdinand Gilmore, another salesman present at the May 9 meeting (Tr. 292), and obviously as disinterested and impartial a witness as Herman, also contradicted Burns' testimony and the Examiner's finding, for Gilmore also testified that *no one protested to Haggerty regarding the sale made by Frachalla* (Tr. 297). Gilmore's testimony, therefore, further corroborated and supported Haggerty's testimony. But the Examiner nonetheless ignored the testimony of these disinterested and impartial witnesses because, apparently, their testimony, and Haggerty's too, made the reasons in support of his ultimate finding of discrimination largely untenable.

While the Trail Examiner found in connection with the May 9 meeting that Burns had remarked at the conclusion of Haggerty's presentation about Frachalla's earlier sale: "Ah s--t, he's just trying to make a point" (J. A. (1) 11), he failed to mention Burns' further impeachment in connection with this incident leading, ultimately, to Burns' termination. On cross-examination, Burns at first denied that *he* had said anything at all during the meeting. In fact, Burns even volunteered that he had made it his "business all the way through the meeting not to say anything if [he] could possibly help it." After further cross-examination, however, Burns finally shifted his testimony by allowing that he might have said something, but he did not think so (Tr. 109-113).

In connection with the final incident leading to Burns' termination, the Trial Examiner found that Burns later on May 9 came to Haggerty's office to criticize the sale made by Frachalla and to advise Haggerty that Frachalla was "out to get" his job (J. A. (1) 11). In making this

finding, however, the Examiner again credited impeached and improbable testimony from Burns, while largely ignoring the corroborated testimony of Haggerty. Furthermore, the Examiner failed to mention the evasive and shifting nature of Burns' testimony in his findings. Also unmentioned by the Examiner was the fact that Burns had again been discredited.

The record shows that Haggerty testified that after Burns entered his office after the May 9 sales meeting, he stated *only*: "Jack, Tom Frachalla is out to get your job. *I'm warning you.* * * * Believe me he is, Jack [emphasis added]" (Tr. 335-337). In this context, then, the Examiner failed to mention, first, that Burns had categorically denied on cross-examination that Haggerty was told that Frachalla was out to get his job (Tr. 115-116). Moreover, the Examiner failed to mention that Burns, on cross-examination, and before shifting his testimony, actually corroborated Haggerty's testimony by *volunteering* that he *remembered* saying to Haggerty about Frachalla: "*Look out for Tom*" [emphasis added] (Tr. 115-116). And, finally, the Examiner failed to conclude, as he properly should have, that in warning Haggerty about Frachalla, Burns had in effect *warned both managers to look out for the other*, for it will be remembered that Burns had earlier warned Frachalla about Haggerty's sincerity (Tr. 196-198).

The Trial Examiner completely ignored and failed to mention that Haggerty's testimony regarding what was said to him by Burns after the May 9 meeting was further corroborated and supported by Burns *himself*, whose testimony was again impeached on cross-examination. Thus, in connection with the conversation wherein he was discharged on May 10, Burns contended in his usual vague manner on direct examination (Tr. 56-61), and he several times insisted on cross-examination, that *nothing* was said concerning Burns' remarks to Haggerty about Frachalla

after the May 9 sales meeting. But then, Burns was again shown to be untruthful when his testimony was impeached by a prior affidavit given the Board, wherein Burns had stated on oath that (Tr. 156-158):

> The next afternoon, on May 10 . . . [Frachalla] opened the conversation with "I don't know where to begin, Andy, but Jack tells me that you told him *to be careful of me*" [emphasis added].

Burns' *own* affidavit, therefore, reflects that he undoubtedly warned Haggerty after the May 9 sales meeting *to look out for Frachalla*. Otherwise, Frachalla would not have mentioned the matter to Burns at the time of his discharge. And since there is no evidence whatever in the record that Burns denied having warned Haggerty about Frachalla on May 9, it is clear that the Examiner again erred in failing to credit Haggerty's testimony, this time in connection with the latter's conversation with Burns about Frachalla occurring after the May 9 sales meeting. Moreover, under all the circumstances, it appears equally clear that Burns *never said anything* to Haggerty at that time about Frachalla's sale on May 7, for the relevant, credible evidence—ignored by the Examiner—corroborates Haggerty's testimony to this effect (Tr. 335-337). And, finally, it should be noted that Burns' warning to Haggerty about Frachalla on May 9, and the obvious fact that he said nothing at that time about the latter's sale of a car on May 7, is consistent with Haggerty's testimony of Burns' remark on May 10, when Burns was reminded at the time of discharge of the warning he had given Haggerty about Frachalla. According to Haggerty, Burns persisted even then by stating: "What I said was true. All the things I said were true. [Frachalla] is trying to get your job" (Tr. 340-342).

The decision to discharge Burns was formulated by Haggerty and Frachalla in consideration of, and in con-

text with, the foregoing acts engaged in by Burns. In assessing these acts, both managers concluded that Burns should be discharged. As Haggerty expressed it: "We couldn't have that man work for us and think this way about the used car manager, about the new car manager, and about [Bert Ferrell]" (Tr. 339). But Frachalla, too, expressed resentment with the conduct of the "man that had caused me to get fired." In reflecting upon Burns' then current conduct, Frachalla "felt . . . Burns was giving me more aggravation and I didn't want any" (Tr. 227-228). Thus, because Burns was disrespectful to his supervisors and because it was felt he had attempted to create dissension between them, Haggerty and Frachalla terminated Burns.

As we have shown above, the record amply supports a finding that more than sufficient justification existed for Haggerty and Frachalla to discharge Burns for the reasons assigned to that action by the petitioner. Substantial evidence clearly supports such a finding, contrary to the Trial Examiner and the Board. The Examiner's failure to conclude that Burns' discharge was motivated exclusively because of his disrespectful conduct to supervisors and because it was felt Burns had attempted to create dissension between Haggerty and Frachalla is attributable primarily to his failure to properly evaluate the entire record. Clearly, substantial evidence on the entire record does not support the finding that Burns was discharged for reasons other than those advanced by petitioner. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

C. Substantial Evidence on the Entire Record Does Not Support the Trial Examiner's Conclusion, Adopted by the Board Majority, That Burns' Discharge Was Discriminatorily Motivated.

In reaching the conclusion that Haggerty and Frachalla were discriminatorily motivated in discharging Burns, the Trial Examiner in effect found, first, that both managers were not motivated in discharging Burns by any of the reasons relied upon by petitioner; and, second, that Burns' conduct (or misconduct) relied upon by petitioner in terminating Burns was nothing more than a pretext to conceal the real reason for his discharge, namely his union activities (J. A. (1) 16-18).

The evidence in connection with the Trial Examiner's first stated conclusion has already been considered and discussed in some detail. Consideration of the Examiner's second stated conclusion which follows hereafter, is of course inextricably interwoven with the first, and should be considered in that context.

The Trial Examiner's second above stated conclusion, that Haggerty and Frachalla were motivated to discharge Burns for discriminatory reasons, cannot stand analysis. Thus, the fact that the two managers decided to discharge Burns at a meeting on the evening of May 9, rather than during normal business hours (J. A. (1) 16-17) does not, contrary to the Examiner's views, indicate that the asserted reasons for the discharge were pretextual. May 9, the day of Burns' culminating conduct, was Frachalla's day off, so that he was unaware of Burns' misconduct that date until 9 p.m. that evening, when he met Haggerty at petitioner's office. When, however, Frachalla learned of Burns' slanderous and impertinent remarks made about him that day and about Burns' apparent efforts at stirring

up dissension between him and Haggerty, it was only natural that, in light of his belief that Burns' past efforts of this nature had resulted in his earlier discharge, he should want immediate action to be taken against Burns. Furthermore, the following day was Haggerty's day off (J. A. (1) 44). Thus, the fact that the decision to discharge Burns was made on the evening of May 9, rather than deferred until May 11, the next day when both Haggerty and Frachalla would be on duty, fails to suggest that Burns' conduct of May 9 was not the cause of the discharge, but rather that this conduct, in context with Burns' prior misconduct, was regarded as so serious, especially by Frachalla, as to require immediate attention.

The Trial Examiner's conclusion of unlawful motivation incident to Burns' discharge appears, however, basically to rest on his inference that both Haggerty and Frachalla feared Burns' activities on behalf of the Union. But this inference is without support in the record; it rests on findings in connection with which the Examiner further ignored, distorted or misstated other substantial evidence in the record.

According to the Examiner's view, "credence" for his inference that Haggerty and Frachalla were motivated to discharge Burns because they feared his activities on behalf of the Union is found in the following: (1) That only a day before Burns' discharge, Harrison and other salesmen expressed "resentment" concerning Frachalla's sale of an automobile on May 7, a "resentment" which Burns allegedly voiced to Haggerty "again" that same afternoon; (2) that Burns had in effect made it clear to Haggerty, despite his "hope" to the contrary, that he was still "extremely active" in the Union since he told Haggerty about a week earlier that the "government" was going to look into the "evasive practices of other dealers";

and (3) that the foregoing, coupled with the fact that the Union could again petition the Board for an election among the salesmen the following December, brought Haggerty to the realization that the best and quickest way to avoid unionization was to discharge Burns (J. A. (1) 17-18).

With reference to (1) above, we have previously shown that neither Harrison nor any other salesman expressed any comment at the May 9 sales meeting concerning Frachalla's May 7 sale, except that Burns had shouted a disparaging and insulting remark about Frachalla in the presence of other salesmen, thereby ruining the effect of Haggerty's talk (see pp. 25-26, *supra*). While Burns did talk to Haggerty later that same day, we have also shown that Burns did so only to warn Haggerty to look out for Frachalla, who was alleged to be out to get Haggerty's job (see pp. 26-28, *supra*). With reference to (2) above, the record shows that Haggerty testified that the *last* conversation had with Burns concerning union matters of any kind occurred about three months before his termination (Tr. 352-356). Yet, as in other instances, the Examiner relied upon the frequently impeached and wholly uncorroborated and unsupported testimony of Burns as basis for his finding that he had told Haggerty about a week before his discharge what the government was going to do in relation to *other* dealers. In any event, there is no support whatever in the record for the Examiner's inference that Haggerty had earlier expressed the "hope" that Burns was "through" with the Union. If the Examiner had not ignored virtually all of the testimony from petitioner's witnesses, or had he not otherwise distorted or misstated much of that which was not ignored, he would have found, as we show immediately hereafter, that Haggerty was without an animus toward the Union and that he was in fact unconcerned about the possible organization of petitioner's salesmen. With reference to (3) above, the

record shows that the decision to discharge Burns was made and carried out by Haggerty and Frachalla *alone.*[14] In connection with their attitude toward Burns' union activities at petitioner's place of business—or anywhere else—there is no probative evidence whatever to support a finding that Frachalla was motivated by anti-union considerations in concluding, with Haggerty, that Burns should be discharged. As for Haggerty, his undisputed testimony—completely ignored by the Examiner—shows that Burns was at one time assured by Haggerty that he had nothing against the Union (Tr. 349-350); at another time, *after* the Board election when Burns indicated he was going to *continue* his union efforts on behalf of the Union, Haggerty responded: "Well, fine" (Tr. 352-353); and on yet another occasion, after Burns had talked about the Union to Haggerty, the latter *encouraged Burns to persist in his union efforts* by stating: "Andy, if you think the Union is what you want, if you think it's for the men and the betterment of the men . . . you are bound morally *to follow it up and stay with it* [emphasis added]" (Tr. 347-349).

The fiction engaged in by the Trial Examiner that Burns was discharged as soon as possible after Haggerty learned that Burns intended to continue working to organize petitioner's salesmen is further without logic and support in the record. In the first place, we submit that, even if Burns did remark to Haggerty about evasive other dealers in May, there is no rational nexus between that finding and the Examiner's inference that Haggerty, based on

14. The possibility of Burns' discharge was never discussed with Bert Ferrell, who did not participate in any way in the formulation or execution of the decision to terminate Burns and became aware of his dismissal only after such action had been taken by Haggerty and Frachalla (Tr. 259).

Burns' remark, should suddenly have realized that Burns intended to continue organizing petitioner's salesmen, thereby precipitating Burns' discharge. Apart from the Examiner's irrational conclusion, however, the record shows that Haggerty was aware *several months prior to Burns' discharge,* but *after* the Board election, that Burns intended to continue his efforts on behalf of the Union (Tr. 352-356). There is nothing in the record to indicate that Haggerty thereafter had reason to believe that Burns had changed his attitude in this connection. Thus, the remark about other dealers being evasive, even if made, added nothing to Haggerty's knowledge of Burns' union activities and hardly supports a conclusion that Burns was discharged in May for his union activities—especially in light of the fact that petitioner had been aware of those activities since the previous July, despite them had prevailed in the December election, and could not possibly be faced with another election before the following December.[15]

The credibility resolutions of the Trial Examiner in connection with the motivation of Haggerty and Frachalla in discharging Burns are, according to the Board, based on the underlying facts as the Examiner found them. The present Board majority has indiscriminately adopted these facts in their entirety. But, as we have shown, several significant findings by the Examiner in regard to the acts of misconduct engaged in by Burns culminating in his discharge are clearly contrary to or unsupported by the record. Similarly, as we have also shown, virtually every one of the findings by the Examiner in regard to the alleged anti-union motivation of Haggerty and Frachalla in terminating Burns is just as clearly contrary to or unsupported by the record. Consequently, we submit that the Board's adoption of the Examiner's ultimate inferences and con-

15. Section 9 (c) (3) of the Act precludes the holding of more than one valid election in any twelve-month period.

clusion based on the facts as *he* found them, that Burns' discharge was not motivated for the reasons given by Haggerty and Frachalla but for discriminatory reasons, are clearly not supported by substantial evidence *when considered on the record as a whole.* Cf. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

While the Examiner did indicate at one point some reliance on "the demeanor of the witnesses involved as they testified" (J. A. (1) 16), it is clear that his disbelief of the reasons asserted by petitioner for Burns' discharge was based upon his analysis of the record facts. From these facts, the Examiner drew the inference that Burns had been discharged for his union activities and that the testimony of Haggerty and Frachalla to the contrary was not to be believed.[16] But in reaching the determination that Burns was discharged for discriminatory reasons, the Examiner's conclusion is a *legal* conclusion and, therefore, not entitled to special weight (Notice 2).[17] In fact, we

16. That the Examiner actually based the mentioned inference exclusively on the facts as he found them—and not on the demeanor of testifying witnesses—is reflected, *inter alia*, by the Examiner's unguarded remark made after Frachalla had related to the Examiner, pursuant to the latter's request, the reasons discussed with Haggerty on May 9 calling for Burn's discharge. After these were related to the Examiner, his disbelief that *anyone's* termination could result for *such* reasons in the absence of an unlawful motive is shown by his remark: "In other words, all these so-called—. You said these six reasons that you—. Is that the way you described it?" (Tr. 226). Parenthetically, we might add that such a reaction *mid-way* through the hearing hardly seems indicative of a lack of bias on the part of the Examiner in regard to the eventual outcome of the case.

17. Contrary to the present Board majority's notion that they "should" have accepted the Examiner's inferences once his findings of fact were adopted, it is well settled that the Board may refuse to follow its Examiner in crediting testimony where it conflicts, as here, with well

submit that in effecting credibility (or demeanor) findings in connection with the motivation of Haggerty and Frachalla in discharging Burns—a conclusory finding which appears based on an inference drawn from an erroneous assessment of the facts—the Examiner engaged in an exercise far foreign to conventional theories of credibility he should have applied. In this posture, the Examiner's credibility findings are entitled to but little weight. Cf. *NLRB* v. *Florida Citrus Canners*, 311 F. 2d 541, 543-544 (C. A. 5).

We acknowledge that as a general rule questions of credibility are for the trial examiner, and a reviewing court will not disregard the superior advantage of the examiner, who heard and saw the witnesses, for determining their credibility and for ascertaining the truth. See e.g., *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F. 2d 421, 425 (C. A. 4); *NLRB* v. *School Timer Frocks, Inc.*, 224 F. 2d 336 (C. A. 4); *NLRB* v. *Dinion Coal Coil Co.*, 201 F. 2d 484, 487-490 (C. A. 2). But a reviewing court need accord to an examiner's findings no more weight than in reason and judicial experience they deserve. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 496. Accordingly, an appellate court is not precluded from independently determining what weight certain testimony which an examiner finds credible is to have when evaluating the evidence on the record as a whole. *Portable Electric Tools, Inc.* v. *NLRB*, 309 F. 2d 423, 426 (C. A. 7). Incident to its evaluation, a reviewing court

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supported and obvious inferences from the rest of the record. *NLRB* v. *Pyne Molding Corp.*, 226 F. 2d 818, 819 (C. A. 2); *NLRB* v. *Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 426 (C. A. 6). Cf. *Universal Camera Corp* v. *NLRB*, 340 U. S. 474, 492-497; *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 418, 420-421. Such a refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives. *NLRB* v. *Pyne Molding Corp., supra.*

may properly reject the credibility findings of a trial examiner. *Universal Camera Corp.* v. *NLRB, supra; NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404; *NLRB* v. *Florida Steel Corp.*, 308 F. 2d 931, 938. Such rejection extends also to credibility findings based on demeanor. As the late Justice Frankfurter stated in *NLRB* v. *Walton Mfg. Co., supra,* at page 418:

> The opportunity of the trier of fact to observe the demeanor of witnesses should not be overlooked. But neither should it be overlooked that the Board itself has no opportunity to observe the demeanor of witnesses. Yet the Board is not required to accept a trial examiner's credibility findings . . . and, therefore, neither [are] the [Courts of Appeal] . . . [D]ue regard for the advantage of the trier of fact does not require appellate impotence.

In context with the credibility findings effected by the Trial Examiner herein, we have shown that he wholly ignored considerable substantial evidence presented by the petitioner, much of it undisputed; in other instances, he substantially distorted or misstated important evidence to the petitioner's prejudice. Despite the fact that the General Counsel presented testimony from only *one* witness—the alleged discriminatee—the Examiner credited his unsupported and uncorroborated testimony almost in its entirety. Even though Burns was a highly vague and evasive witness whose self-serving testimony was several times impeached, the Examiner substantially discredited *every* witness appearing for the petitioner, except one,[18] by either ignoring, distorting or misstating their testimony. The Examiner achieved this remarkable result despite the fact that the testimony of not a single witness for the petitioner was in any way contradicted—except by unsupported,

18. The exception was Isabel Laban, whose testimony that she heard Burns call Ferrell "a son of a bitch" was credited despite Burns' denial.

uncorroborated and partially discredited testimony from Burns, a highly interested and prejudiced witness. Where one or more of these defects has been found present, courts of appeal have denied enforcement.

In *NLRB* v. *Elias Bros. Big Boy, Inc.*, 327 F. 2d 421 (C. A. 6), for example, a case very similar to the instant case, enforcement was denied where a trial examiner had relied almost solely upon the testimony of an alleged discriminatee and union organizer to prove a claim of discrimination. The examiner had credited her testimony, which was largely uncorroborated, and discredited the testimony of company witnesses to the contrary. The court refused to accept the credibility findings of the examiner, even though adopted by the Board, and denied enforcement for the reason that the court failed to find substantial evidence to support the Board's order. Among other things, the court concluded that the alleged discriminatee was a highly prejudiced and interested witness who would gain personally from the back-pay award recommended by the examiner, who found she had testified falsely upon three subjects. Yet, he credited her with self-serving testimony on other subjects, despite such testimony being vague and evasive on certain points.

In another case having elements in common with the instant case, namely, in *NLRB* v. *Audio Industries, Inc.*, 313 F. 2d 858 (C. A. 7), the court denied enforcement of a Board order where the examiner improperly disregarded evidence in support of the employer's position, drawing inferences contrary to direct testimony to support a finding of anti-union animus. Such inferences, the court held, are not ordinarily sufficient to support a finding of anti-union animus. *NLRB* v. *Audio Industries, Inc., supra*, at pp. 860-861. Cf. *NLRB* v. *Kaye*, 272 F. 2d 112, 114 (C. A. 1); *NLRB* v. *Ray Smith Transport Co.*, 193 F. 2d 142, 146 (C. A. 5); *NLRB* v. *Fox Mfg. Co.*, 238 F. 2d 211, 214

(C. A. 5), and cases cited therein. Furthermore, the court concluded that the examiner's practice of consistently discrediting the testimony of respondent's witnesses despite the lack of contradictory testimony failed to reflect a complete and fair consideration of all the evidence. Cf. *NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680, 689 (C. A. 7); *Farmers Co-Op.* v. *NLRB*, 208 F. 2d 296, 303 (C. A. 8); *NLRB* v. *Ray Smith Transport Co., supra.* See also *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502.

The Trial Examiner's decision herein discloses reliance on a basic technique frequently employed by the Board and rejected by the courts. After initially referring to "the harshness of [petitioner's] action" in discharging Burns (J. A. (1) 14), the Examiner then proceeded with a consideration of the reasons assigned by petitioner as cause for his dismissal. In his labored analysis, the Examiner in effect concluded that each reason was actually explanable in Burns' favor, or else a pretext to conceal Haggerty and Frachalla's true motivation in terminating Burns, namely, his union activities. Judicial condemnation of this technique has been well expressed in *NLRB* v. *McGahey*, 233 F. 2d 406 (C. A. 5), wherein the Court stated at pp. 412-413:

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, naught remains but anti-union purpose as the explanation. But as we have so often said: management is for

> management. Neither Board nor Court can second guess it or give it gentle guidance by over-the-shoulder supervision. * * * It has as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

Even after the reasons offered by petitioner as cause for Burn's discharge are discounted, which they properly should not be, the Board must still make an *affirmative and positive* showing that the real motive of Haggerty and Frachalla in terminating Burns was to discourage and prevent union activity. Cf. *Riggs Distler Co.* v. *NLRB*, 327 F. 2d 575, 580 (C. A. 4); *Portable Electric Tools Inc.* v. *NLRB*, 309 F. 2d 423, 426-427 (C. A. 7); *E. Anthoney & Sons* v. *NLRB*, 82 U. S. App. D. C. 249, 163 F. 2d 22, cert. den. 332 U. S. 773. Such a showing must be supported by substantial evidence *on the whole record*, taking "into account contradictory evidence or evidence from which conflicting inferences could be drawn" and whatever in the record "fairly detracts from its weight, * * * including the body of the evidence opposed to the Board's view." *Universal Camera Corp* v. *NLRB*, 340 U. S. 474, 477-478. Negative evidence alone cannot supply the proof which must underlie the Board's order if it is to stand. *Portable Electric Tools, Inc.* v. *NLRB*, 309 F. 2d 423, 426 (C. A. 7); *NLRB* v. *Florida Steel Corp.*, 308 F. 2d 931, 935-936 (C. A. 5); *NLRB* v. *McGahey*, 233 F. 2d 406, 411 (C. A. 5). See also: *NLRB* v. *Citizen News Co.*, 134 F. 2d 970 (C. A. 9); *Bon-R Reproductions, Inc.* v. *NLRB*, 309 F. 2d 898 (C. A. 2); *NLRB* v. *Jamestown Sterling Corp.*, 211 F. 2d 725 (C. A. 2). Nor may the Board's order be enforced where grounded on isolated incidents of dubious significance. *NLRB* v. *Audio Industries, Inc.*, 313 F. 2d 858, 863-864 (C. A. 7). The "substantial evidence" test has not been satisfied where evidence merely

creates a suspicion, or amounts to no more than a scintilla or gives equal support to inconsistent inferences. *Riggs Distler & Co.* v. *NLRB*, 327 F. 2d 575, 580 (C. A. 4); *NLRB* v. *Citizen News Co.*, 134 F. 2d 970, 974 (C. A. 9); *NLRB* v. *Ace Comb Co.*, ... F. 2d ..... (C. A. 8), decided March 30, 1965. See also *NLRB* v. *Florida Steel Corp.*, 308 F. 2d 931, 935, 223 F. 2d 748, 749 (C. A. 5); *NLRB* v. *Shen-Valley Meat Packers, Inc.*, 211 F. 2d 289, 293 (C. A. 4).

Under all the circumstances herein, therefore, we submit that this Court cannot "conscientiously" find that the evidence supporting the current Board majority's decision herein "is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Cf. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488.

III. THE BOARD'S REMEDY IS INAPPROPRIATE IN THE EVENT THIS COURT DETERMINES THAT THE BOARD'S SUPPLEMENTAL DECISION AND ORDER SHOULD BE ENFORCED.

A. That Portion of the Board's Order Awarding Burns Full Backpay Constitutes a Clear Abuse of Discretion.

The Board, in its supplemental decision and order, adopted the Trial Examiner's recommendations (S. D. & O. 4). One of the Examiner's recommendations was that petitioner, in effect, pay back pay to Burns from the time of his discharge on May 10, 1962, to whatever date petitioner offered Burns reinstatement to his former or substantially equivalent position of employment (J. A. (1) 18-20). Inasmuch as the petitioner has refused Burns reinstatement to his former or substantially equivalent position of employment, the Board now seeks enforcement of

an order compelling petitioner not only to reinstate Burns, but to award him backpay during the period from May 10, 1962, to whatever date hereafter Burns might be reinstated. Thus, the Board would have this Court enforce an order that would award Burns backpay *even during a period of time when there was no obligation whatever upon petitioner to reinstate Burns, let alone award him backpay.* The current Board's position overlooks the fact that "it" had concluded in its original decision and order dated April 22, 1963, that Burns' discharge was not unlawful, so that in effect there was no obligation on petitioner at that time and for some while thereafter, if at all, to reinstate Burns and to award backpay. The Board's position also overlooks the fact that it was not until December 9, 1964, that the Board on its *own* motion, and even though it had not been mandated to do so, issued a supplemental decision and order reversing "its" original decision and order. It was not until the issuance of the Board's "final" order, therefore, that the Board *for the first time* concluded in any decision and order that Burns was entitled to reinstatement and *full* backpay. In this posture, the Board's backpay award constitutes a gross abuse of discretion.

At the outset, we acknowledge the broad discretionary powers of the Board to fashion remedies which will effectuate the purposes of the Act. *Virginia Electric & Power Co.* v. *NLRB,* 319 U. S. 533, 539. But the Board's discretionary powers are not unlimited. *NLRB* v. *Gullet Gin Co.,* 340 U. S. 361, 362. Clearly, it is the duty of the judiciary to protect against arbitrary action taken in the name of discretion. *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 47.

In the past, the Board has tolled an employer's backpay obligation under circumstances where, as here, the Board initially failed to find a violation of the Act but where its

initial determination was later reversed by the Board or a court. See, *e.g., Kohler Co.*, 148 NLRB No. 147; *Fibreboard Paper Products Corp.*, 138 NLRB 550; *Walls Manufacturing Co., Inc.*, 137 NLRB 1317. Cf. *Oregon Teamsters' Security Plan Office*, 119 NLRB 207.[19] However, even though the circumstances in the instant case would clearly suggest that a tolling of backpay is even *more* appropriate here than in any of the previously cited cases, the Board has refused any tolling of backpay and, instead, seeks enforcement of its order to gain the maximum possible amount.

The refusal of the Board to accord litigants similarly situated the same even-handed treatment consistently has met with the disapproval of the courts which, like the Board, have a responsibility to see that the Act is fairly and justly applied. *NLRB* v. *McGough Corp.*, 153 F. 2d 420, 421 (C. A. 5). As the Seventh Circuit stated in modifying the Board's backpay award in *NLRB* v. *Mall Tool Co.*, 119 F. 2d 700, at 702:

> Consistency in administrative rulings is essential *for to adopt different standards for similar situations is to act arbitrarily.* Under such circumstances, affirmative orders violate administrative discretion and become punative, rather than remedial measures, outside the scope of the Board's powers [emphasis added].

Similarly, a retroactive change in Board policies, without sound justification, uniformly has been held by review-

19. In the *Kohler* case, *supra*, the Board tolled backpay from the time striking employees sought to return to work to the date of a court remand; in the *Fibreboard* case, *supra*, the tolling period ran from the date of termination of employees to the date of the Board's supplemental decision; in the *Walls Manufacturing Co.* case, *supra*, the tolling period spanned the period from the trial examiner's decision to the Board's supplemental decision; and in the *Oregon Teamsters'* case, *supra*, tolling occurred between the Board's original and supplemental decisions.

ing courts to be discriminatory and an abuse of discretion. See *e.g.*, *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, 174 (C. A. 4), cert. den. 361 U. S. 943; *NLRB* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149 (C. A. 9); *NLRB* v. *Walt Disney Productions*, 146 F. 2d 44, 50 (C. A. 9), cert. den. 324 U. S. 877. The rationale of the cases which limit the Board's power to act retroactively is stated in *Pederson* v. *NLRB*, 234 F. 2d 417 (C. A. 2), wherein the court said at p. 149:

> . . . retroactive action [by the Board] results in a species of entrapment. Persons who have relied on the Board's . . . policy suddenly find themselves penalized for their conduct.

After the Board had originally found that petitioner's discharge of Burns was lawful, it can hardly be contended now that petitioner was not entitled to rely on the Board's original decision herein. In fact, petitioner *did* rely on that decision and order, and petitioner *continues* to rely thereon in view of the reversal thereof *only* because of the current Board's disobedience to the mandate of this Court on remand. Manifestly, it would now be wholly inequitable and unjust, even by the Board's own standards, to permit the Board to impose a backpay liability upon petitioner during a period when petitioner justly relied upon the Board's own favorable ruling. In this respect, the Board's language in *Fibreboard Paper Products Corp.*, 138 NLRB 550, at 555, is particularly apropos:

> In the special circumstances of this case where the Board, upon re-examination of the relevant legal principles, has reversed its own prior determination that Respondent had not by its conduct violated the Act, we believe it would be *wholly inequitable* to hold Respondent liable for backpay from the date it initially terminated the employees here involved [emphasis added].

The powers conferred upon a court of appeals under the Act to enforce orders of the Board are equitable in nature and may be invoked only if the order sought to be enforced by the Board is consistent with the principles of equity. Cf. *NLRB* v. *Kingston Cake Co.*, 206 F. 2d 604, 611 (C. A. 3). See also *NLRB* v. *Wilkening Mfg. Co.*, 207 F. 2d 98, 101 (C. A. 3). But the backpay provisions of the Board's order sought to be enforced by this Court are wholly inequitable and inconsistent with the principles of equity. The Board's refusal in this case to toll backpay during the period when petitioner relied on the Board's original decision—while doing so in other contemporaneous cases—constitutes a clear abuse of discretion. Such arbitrary and unjustified discrimination by the Board is punitive; it can have no tendency whatever to effectuate the purposes of the Act. Where an order of the Board is found to be punitive, and not remedial or reasonably designed to effectuate the purposes and policies of the Act, a court of appeals has the power to refuse enforcement. *NLRB* v. *Houston Maritime Assn.*, 337 F. 2d 333, 337 (C. A. 5); *Local 138, Operating Engineers* v. *NLRB*, 321 F. 2d 130, 135 (C. A. 2); *Local 1351, S. S. Clerks & Checkers, ILA* v. *NLRB*, 117 App. D. C. 304, 307, 329 F. 2d 259, 262, cert. den. 377 U. S. 993. It is not enough to justify an exercise of punitive power to say that it would have the effect of deterring persons from violating the Act. *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 12; Cf. *Hartford-Empire* v. *U. S.*, 323 U. S. 386, 409.

Under all the circumstances herein, the Board's order awarding full backpay should not be enforced by this Court in the event it is determined that petitioner violated the Act in discharging Burns. If this Court concludes that Burns' discharge was unlawful, then, we submit, the Board's backpay order should be modified to exclude from it the period between the Board's original decision favorable to

petitioner and the date of this Court's enforcement of the Board's order. Only if the Board's order is modified as suggested would the punitive and inequitable taint inherent therein be removed. Only when modified as suggested can it fairly be said that the Board's clear abuse of discretion, so patently evident in the present backpay order, has been eliminated.

B. That Portion of the Board's Order That Petitioner Reinstate Burns Should Not be Enforced.

Apart from the backpay and other provisions of the Trial Examiner's decision adopted by the Board, the latter also incorporated in its order the Examiner's recommendation that petitioner reinstate Burns to his former or substantially equivalent position of employment. We submit that this portion of the Board's order should not be enforced in the event that this Court determines that Burns' discharge violated the Act.

It is evident on the basis of the record herein that a basic antagonism existed between Burns and petitioner's supervisors that would preclude future harmonious relations between them. Burns' unnecessarily disrespectful attitude toward his supervisors; his unrestrained and irresponsible statements to his supervisors having the foreseeable result of creating dissension and animosity between them; his outrageous and unwarranted statements about his supervisors in the presence of other employees, belittling and demeaning their efforts on behalf of the petitioner; and his calling into question before other employees the maternal ancestry of Bert Ferrell, petitioner's owner, clearly portend ill for all concerned should this Court now force a renewal of the employment relationship.

In *NLRB* v. *National Furniture Mfg. Co.*, 315 F. 2d 280, 286-287 (C. A. 7), the court enforced all of the Board's

order except that the discriminatee be reinstated. While the court denied it was establishing any "Pollyanna standards" for the conduct of workmen toward their supervisors, the court felt that such standards should at least be compatible with the normal employer-employee relationship. But the court found that the discriminatee's conduct, which involved most, but not all, of the same elements of misconduct present in the instant case, was incompatible with the normal employer-employee relationship. As a consequence, even though the court agreed with the Board that the discriminatee was terminated for reasons proscribed by the Act, the court declined to enforce that portion of the Board's order requiring the employer to reinstate the discriminatee. The latter's conduct, said the court, "renders it difficult for us to enforce a renewal of a relationship that bids ill for all concerned." *NLRB v. National Furniture Mfg. Co., supra*, at p. 287.

CONCLUSION.

For the foregoing reasons, petitioner respectfully requests that this Court deny enforcement of the Board's supplemental decision and order. However, in the event this Court determines petitioner's discharge of Burns was unlawful, we request that the Board's order be modified: (1) To deny reinstatement to Burns; and (2) backpay during the period from April 22, 1963, to the date of this Court's grant of enforcement, or in any other manner deemed proper by the Court.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 8(a)(3).

Sec. 8(a). It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Sec. 9(c)(3). No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

Sec. 10(e). * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REPLY BRIEF FOR PETITIONER.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 19,222

FERRELL-HICKS CHEVROLET, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

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Respondent.

REPLY BRIEF FOR PETITIONER.

I. THE SCOPE OF THE COURT'S MANDATE AND ITS ACCEPTANCE BY THE BOARD ON REMAND DID NOT PERMIT THE BOARD TO TAKE ACTION CONTRARY THERETO.

The present Board's attempt in its brief to the Court to rationalize as proper the reversal of "its" original decision incident to a remand for "clarification" only serves to underscore the gross impropriety of the action taken by the Board. Under all the circumstances herein, we

again submit that it would be wholly inequitable and unconscionable were the Board now permitted to "get away with it." The arguments advanced by the Board to achieve that end are without merit.

Despite the Board's contention that it *did* clarify its original decision (Bd. brief, p. 17), it is patently obvious it did not do so. We submit that no amount of argument from the Board can now make it appear that the reversal and setting aside of "its" Decision and Order can somehow be equated with the "clarification" of that Decision, which is *all* that the Board was mandated to do.

In oral argument before the Court, counsel for the present Board argued at length that its Decision and Order was proper in all respects. However, when the Court in effect expressed difficulty with the Board's handling of certain credibility findings of the Trial Examiner, Board counsel strongly urged the Court to remand for clarification *on this point*. This Court obliged Board counsel in this respect, as the Court's order of remand reflects. Thus, the specified purpose of the remand—for which the Board had made application—qualified the Court's order of remand and created a condition which the Board was bound to observe. *Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 372. In this posture, not even the present Board can now seriously contend that it urged a remand upon the Court for the reason of permitting the Board to *reverse* its original decision, rather than simply to clarify it. Yet, the Board now contends that it in effect was given license to engage in a full reconsideration of "its" original decision, while completely ignoring the fact that its own counsel had urged, and obtained, a remand for clarification on a single, narrow issue, only.

Board counsel also contended in oral argument before the Court that it was implicit—but not explicit—in the original

decision that the Board had rejected the credibility resolutions effected by its Trial Examiner with respect to the subjective reasons of Haggerty and Frachalla in discharging Burns (Bd. briefs, pps. 17-18). Had the present Board confined itself to *only* a clarification of its original decision, instead of engaging in a full reconsideration of the merits—in apparent disregard of the Court's mandate on remand—the Board would presumably have articulated its rejection of the Examiner's credibility resolutions in question, thus making explicit in its Decision what Board counsel had argued before the Court was implicit therein.[1] If the present Board had thus adhered to the mandate of this Court, it could not have reached the merits *again*, thereby leading to the "discovery" by the present Board majority that "its" original decision was "erroneous," and should therefore be reversed.[2]

Incredibly, the Board allegedly now perceives no reason why its original decision should not be reversed, having once decided it was "erroneous" (Bd. brief, p. 20). The short answer here is that the present Board's determination that "its" original decision was "erroneous" is admittedly based on a full *de novo* consideration of the merits (S. D. & O. 3). This, we think, the Board was without power to do, having urged and *accepted* the Court's limited

1. In line with the argument of Board counsel before the Court, a majority of the panel participating in the original decision had in fact rejected the credibility resolutions of the Examiner in question (Notice 2). Moreover, in context with the Board's expressed case law at the time its original decision was handed down, it appears that the Board must also have concluded that the clear preponderance of all the relevant evidence herein left a conviction that the Examiner's credibility resolutions in question were incorrect. Cf. *Standard Dry Wall Products*, 91 NLRB 544, 550, enforced, 188 F. 2d 362 (C. A. 3). Accord: *M & S Company*, 108 NLRB 1193; *Baltimore Steam Packet Co.*, 120 NLRB 1521, 1524.

2. That substantial evidence does not support the present Board's conclusions on the merits (see pet's open. brief, pps. 21-41; and pps. 5-14 herein) is wholly beside the point. The point here is that the Board was without power to reach the merits in any event, this exercise being outside the scope of the Court's mandate accepted by the Board.

mandate on remand.[3] Furthermore, if the Board is now permitted to utilize a remand for "clarification" as a vehicle for reversal, it appears that the Court's jurisdiction and functions under Sections 10(e) and (f) of the Act will have been in part effectively usurped by the Board. Section 10(e) provides in its pertinent part that:

> Upon the filing of [a] petition, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter a decree . . . setting aside in whole or in part the order of the Board. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive. . . .[4]

Thus, despite the fact that exclusive jurisdiction was vested in this Court to, *inter alia*, set aside the order of the Board incident to review of the petition filed with it, the Board, contrary to the exclusive powers granted this Court by the Act, will have performed the Court's functions even though it was without power to do so. Therefore, the *Board's action* in setting aside "its" original order herein does violence to the exclusive jurisdiction and power conferred upon this Court under Section 10(f) of the Act.[5] Also, the Board's action in question is inconsistent with the proposition that the authority of an administrative agency to set its order aside ends with the filing of the

3. It would indeed be chaotic to the process of judicial administration, to say nothing of the injustice and unfairness to the victims subject thereto, if a limited remand for clarification from a reviewing body could be utilized by an administrative agency for a *de novo* consideration of the merits of a case and a reversal of the result therein. This is particularly so, we submit, where the agency, as here, *itself* urged the limited remand upon the Court while defending the merits of a case reversed thereafter by members of the agency who came to participate in the reversal as a consequence of a change in the agency's membership (see pet's open. brief, pps. 18-20).

4. Section 10(f) reflects by reference to Section 10(e) essentially the same provisions as those set forth.

5. At the time that the present Board set aside "its" order herein, the jurisdiction of this Court had been invoked only under Section 10(f) in No. 18,054, wherein petitioner had intervened.

record with the reviewing court.[6] *Pan American Petroleum Corp.* v. *F. T. C.*, 116 App. D. C. 249, 322 F. 2d 999, 1004. Cf. *Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 371.

For the foregoing reasons, as well as those stated in our opening brief (pps. 16-20), the present Board majority was not justified in interpreting the Court's remand as permitting it to reverse and set aside "its" original decision herein. By so doing, the Board has patently traveled outside the orbit of its authority with the result that it has inflicted irreparable injury to the petitioner. We submit, therefore, that it would now be most inequitable and unconscionable to enforce the Board's present "order," if in fact it has attained such dignity. Cf. *NLRB* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388.

II. SUBSTANTIAL EVIDENCE CONSIDERED ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8(a) (3) AND (1) OF THE ACT BY DISCHARGING BURNS.

A. The Evidence Shows That Petitioner Was Not Opposed to the Unionization of Its Salesmen; That It Encouraged Burns' Union Activity.

In its brief, the Board argues that petitioner was opposed to the unionization of its salesmen; that this point "is hardly open to question" (p. 22). We categorically and unequivocally disagree. What is hardly open to question is the fact that petitioner persistently encouraged Burns in his union activity; that it was not opposed to the unionization of its salesmen.

In support of its argument, the Board's brief refers initially to a remark made by Bert Ferrell which was

6. The Board, of course, had previously filed the record with the Court before undertaking to set aside "its" original order pursuant to the remand for "clarification."

heard by Burns, who at the time was posting election notices (p. 22). This remark, that "no son of a bitch was going to tell me how to run my business," so the Board argues, was made in an obvious reference to the Union. While Ferrell admittedly made the remark in question, it was actually made not about Burns, and not about the Union, but *about a customer* with whom Ferrell had just finished talking by telephone. This customer had given Ferrell "quite a chewing out" over the phone—enough so, in fact, that it "really throwed" Ferrell (Tr. 394-396). It is this customer, then, and not Burns nor the Union, to whom Ferrell was referring in the remark heard by Burns.

Even if it is assumed, arguendo, that the remark in question had Burns as its object, there is still no reasonable basis for the inference now drawn by the Board that it constituted an obvious reference to the Union. As in so many other instances in the instant case, the Trial Examiner and the Board have completely ignored certain evidence in the record, almost all of it undisputed, showing that Ferrell was *not* resentful of Burns' union activities, and that he was *not* opposed to the unionization of petitioner's salesmen.[7]

Thus, ignored by the Trial Examiner and the Board was a conversation which occurred shortly after Burns began his organizational efforts on behalf of the Union. At that time, Burns came to Ferrell to "outline" his intentions for Union organization of petitioner's salesmen. After Burns had finished, Ferrell told Burns: "Andy, I don't have no qualms with you." Later in the conversation, after Burns had for some inexplicable reason ventured that he might be fired, Ferrell assured Burns (J.A. (1) 50-51):

> No, Andy. * * * I'd never fire you for that. * * * I'd

7. We have already discussed at some length the wholly uncontradicted and undenied evidence showing that Haggerty and Frachalla were without an anti-union animus; that neither was opposed to Burns' union activities nor to the unionization of petitioner's salesmen; and that Haggerty, at least, even encouraged Burns to engage in his union activity and to *persist therein* (see pet's open. brief, pps. 30-34).

> never fire a man for trying to better himself, and the fact is I'll help you all I can and I still tell you that. I have no qualms with you at all.

Furthermore, toward the conclusion of their conversation, Ferrell also assured Burns that he had no opposition whatever to the organization of petitioner's salesmen (J.A. (1) 51):

> I got three unions in here now . . . why would I object to a union? I got three up here above the scale. I don't have no objection, good Lord. Everything we do is above the scale on the unions. They [are] nothing new to me. I don't have no objections.[8]

Apart from the foregoing, the Board has also ignored other undisputed evidence showing petitioner to be unopposed to the organization of its sales employees. Thus, the record reflects testimony elicited from Ferrell on cross-examination concerning a conversation between the latter and one of petitioner's salesmen occurring just *before* the December representation election. When Ferrell was asked by the salesman about the election outcome, the latter was assured by Ferrell: "It makes no difference to me which way the Union goes. One way or another" (Tr. 424).

The Board relies in its brief upon a second, and last, incident to support its contention that petitioner was opposed to the organization of its salesmen. Thus, it is alleged that the petitioner sent a letter to its salesmen a few days before the December election referring to their relationship as a marriage, which they could not afford to have broken (p. 22). The only support in the record in this connection is the much tainted self-serving testimony of the alleged discriminatee, Burns, who at the termination of the hearing vaguely recalled seeing a letter to this effect bearing the

8. It is undisputed that petitioner has for many years maintained collective bargaining relationships with no less than three other labor organizations, and that petitioner never had any "problems" as a consequence (Tr. 343).

signature of Bert Ferrell (Tr. 430, 433). Burns was unable to "remember" anything else the alleged letter may have said, nor could he produce a copy of it.

The record contains evidence of the fact that a letter was indeed sent to petitioner's salesmen a few days prior to the election, but it contained information regarding a pre-Christmas party to which the salesmen had been invited by the petitioner.[9] This letter did not in any way relate to the Union (Tr. 417-419).

We have shown that the record contains undisputed evidence of Ferrell's assurance to another salesman made just before the election, that it made no difference to Ferrell how the election came out. This statement, we submit, in the context of other undisputed evidence regarding an earlier conversation wherein Ferrell assured Burns that he had no objection to his organizing efforts nor to the unionization of the sales employees, makes Burns' vague uncorroborated and unsupported testimony of the letter he allegedly viewed so incredible and improbable that it should properly have been accorded no weight whatever.[10]

Under all the circumstances herein, we submit that evidentiary support is clearly absent to support the conclu-

9. The salesmen had taken a vote among themselves and decided that a party for them should be held *before* Christmas (Tr. 419, 345, 397-398). Ferrell then made the necessary arrangements, reserving the only date available at the place where the salesmen had decided the party was to be held (Tr. 397).

10. We have already established in our opening brief (pps. 21-33) that Burns' testimony was wholly untrustworthy; that it was impeached innumerable times in divers particulars, despite the Trial Examiner's unwarranted predisposition to accept all of Burns' testimony as Holy Writ. Significantly, the Board has not excepted to a single one of the myriad number of examples we have discussed in our brief in support of the conclusion that Burns was not a truthful witness who could be believed under oath. Nor has the Board excepted in any instance—and there were many—where we have shown that in matters of testimonial conflict between Burns and petitioner's witnesses, Burns was untruthful. Contrary to the Board's contention that *none* of the so-called "crucial factual findings" on which its decision rests are based on Burns' testimony (Bd. brief, p. 27, n. 17), the fact is clearly otherwise. However much the Board may wish it was not so, the Board's order rests very substantially on the untenable foundation of Burns' tainted testimony.

sion which the Board urges upon the Court, namely, that petitioner was opposed to the unionization of its sales employees. In fact, the record shows just the opposite—that petitioner was unopposed to the organization of its sales employees and that Burns was extended every encouragement to attain his Union objectives.

B. Substantial Evidence Fails to Show That the Motivation for Burns' Discharge Was Because of His Union Activity.

The Board has not established that petitioner discharged Burns because of his union activity. Substantial evidence fails to support the Board's contrary conclusion, which rests almost exclusively on inferences drawn by its Trial Examiner having no support in the record.

As we have previously shown, above, the record fails to support the Trial Examiner's finding, adopted by the Board, that petitioner was opposed to the organization of its sales employees. In any event, it is significant to note that not even the Board contends that petitioner's alleged opposition transcended a pre-election period which culminated in petitioner's sales employees rejecting the Union by a substantial margin as their collective bargaining representative in an election conducted by the Board in December 1963. Had there been any irregularity whatever concerning petitioner's conduct in the pre-election period, it is a certainty, we think, that the Union would have filed charges, or at least objections, with the Board. None were ever filed.

The record shows that Burns' discharge precipitated many months after the December 1963 election because of a decision reached by Haggerty and Frachalla, *and by no one else*. As to these supervisors, there is no evidence whatever in the record—not one scintilla—that *they* were in any

way opposed to the organization of petitioner's sales employees. Nor is there one scintilla of evidence in the record showing that *they* were in any way hostile or resentful toward Burns because of his union activity. In fact, the evidence shows that Frachalla was not even employed by petitioner during the period prior to the election, nor for several months thereafter (J.A. (1) 10, 39). As for Haggerty, the undisputed evidence—which the Board has wholly ignored—shows conclusively that Haggerty had earnestly and sincerely encouraged Burns to engage in his activity on behalf of the Union, and to *persist and persevere in this activity.* This encouragement was extended Burns *before* the election, and even *after* the election, after Haggerty was told by Burns that he intended to *continue* his efforts on behalf of the Union (see pet's. open. brief, p. 33). Thus, the Trial Examiner's inference, adopted by the Board, that Burns' discharge was motivated because of his persistent effort on behalf of the Union, is wholly lacking in evidentiary support (see also pps. 30-35 of pet.'s open. brief).

The Board places emphasis in its brief on the Trial Examiner's characterization that the reasons assigned for Burns' discharge by Haggerty and Frachalla was not "worthy of belief" (p. 23). This characterization, so the Board argues, is grounded on the Trial Examiner's conclusion that none of the incidents relied upon as reasons for Burns' discharge was apparently regarded as significant enough even to be mentioned to Burns at the time they occurred (pps. 23-25). We submit, however, that the Board's emphasis is misplaced; that the inference which the Examiner drew is completely unrealistic and unwarranted. It is apparent why the Board initially rejected it in "its" original decision.

It can hardly be said to be unusual that Haggerty did not immediately discuss with, admonish or criticize Burns after learning that the latter had referred to Ferrell as "a son

of a bitch'' during the December election (Bd. brief, p. 24). While Ferrell was never told of Burns' epithet, Haggerty was unaware of this.[11] Thus, Haggerty undoubtedly felt that Ferrell would himself attend to a problem that involved him directly. But there are numerous other possible explanations—although none are required—why Haggerty did not discuss with Burns his intemperate and profane remark about Ferrell. In any event, as an isolated incident at that time, Burns' remark about Ferrell made in a moment of excitement was undoubtedly not as significant then as later, after Burns had manifested his disrespect and devisive conduct toward Haggerty and Frachalla, also. Therefore, it is most unrealistic to imply, as the Examiner did, that Haggerty failed to regard Burns' indecent remark made around Christmas, 1963, as of no consequence.

Nor is there anything unusual about Haggerty not immediately discussing or mentioning to Burns the slanderous and insulting remarks made to Frachalla regarding Haggerty's duplicity (Bd. brief, p. 24). The Examiner's characterization—that Haggerty was not ''sufficiently disturbed''—implies that he *was* indeed disturbed by Burns' critical and degrading remarks. That, after all, is the point, and not even the Examiner could avoid it. Furthermore, Burns' remarks about Haggerty's lack of sincerity were hardly the kind soon to be forgotten, and they undoubtedly colored Haggerty's relations with Burns thereafter, particularly inasmuch as Burns had already manifested profane thoughts about Ferrell. But to imply that Burns' ''stab-in-the-back'' remarks about Haggerty failed to disturb him simply because he did not immediately discuss them with Burns is most unrealistic, particularly since it appears that Haggerty obviously did not care to disclose to Burns that Frachalla had informed on him.

11. The individuals whom Haggerty might have anticipated would apprise Ferrell about Burns' profane remark had in fact failed to do so for the reason they did not have "the heart" to tell him (Tr. 304, 312-313).

Nor is there anything unusual about Haggerty not immediately criticizing Burns when he saw the latter a few hours after Burns had through another indecent remark criticized Frachalla, thereby ruining the effect which Haggerty had hoped to leave with the sales employees at a meeting on May 9 (Bd. brief, p. 25). When Haggerty next saw Burns after the conclusion of the meeting, Burns immediately accused Frachalla of trying to take Haggerty's job away from him. In this context, it is certainly not unusual that Haggerty did not immediately refer to Burns' objectionable conduct engaged in earlier in the day. Indeed, it was only natural that Burns' latest outrage—that Frachalla sought Haggerty's job—should invoke Haggerty's attention and reply. Haggerty's curt response to Burns' accusation—that *he* did not think so—followed by his immediate and abrupt termination of the conversation without saying more, manifests a considerable and marked resentment toward Burns.[12] Haggerty's resentment, provoked by Burns' irresponsible and unwarranted charge about Frachalla, undoubtedly increased thereafter, upon further reflection concerning Burns' other past misconduct, thus precipitating the later meeting with Frachalla wherein it was determined to discharge Burns. This was done the next day, at the earliest opportunity (Tr. 340).

We submit that the reasons assigned by Haggerty and Frachalla as the motivation for discharging Burns are, contrary to the Board, indeed "worthy of belief." We have

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12. The Trial Examiner would also fault Haggerty because he did not deign to inquire regarding the basis for Burns' accusation. In so doing, the Examiner, of course, conveniently ignored the fact that Haggerty and Frachalla had both been present when a customer had complained to them a day or so earlier concerning the inattentiveness of petitioner's salesmen (Tr. 274-279), and that this is what had prompted Frachalla thereafter to consummate the sale of a car to a young couple, whom the salesmen had also ignored (Tr. 202-204; J. A. (1) 10-11). Thus, it was apparent to Haggerty that when Burns' irresponsible and unfounded accusation was made about Frachalla, there was no basis whatever for it—just as there was no basis whatever for Burns' earlier profane remark about Frachalla's sales effort made at the meeting.

previously shown in our opening brief that much—if not most—of the evidence concerning the incidents on which Burns' discharge was based was either ignored, distorted or misstated by the Trial Examiner (pps. 21-29). Likewise, we have shown that this same failing was primarily responsible for the erroneous conclusion reached by the Examiner regarding petitioner's motivation for discharging Burns (pps. 30-41). Thus, it is plain that the Examiner's disbelief of petitioner's reasons for Burns' discharge is without evidentiary support in the record.

On the basis of the *entire* record herein, convincing evidence of *cause* for Burns' discharge stands clear and undisputed. We have shown that the Trial Examiner failed substantially to evaluate the record properly, and the Board has in effect failed to deny the truth of this conclusion in its brief. Instead, the present Board relies *entirely* on the credibility resolution of its Examiner in discrediting *in part* on the basis of demeanor *some* of Haggerty and Frachalla's reasons for discharging Burns (J.A. (1) 16).[13] The Board would have this Court treat its Examiner's resolution as though it was sacrosanct and uncontradicted in any respect; it would have this Court ignore—as it has—the mountain of substantial evidence in the record which very substantially preponderates against the Examiner's resolution. In any event, as we have pointed out in our opening brief, under

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13. A prime motivation for Burns' discharge—completely ignored by the Board and its Examiner—was attributable to the role Burns had played in causing Frachalla's earlier discharge by petitioner as new car sales manager (Tr. 227-228). It is undisputed that Burns even had the temerity to boast to Frachalla about his responsibility in this connection before Frachalla's rehire in the lesser job of used car sales manager (Tr. 185-187). But Frachalla's knowledge concerning Burns' responsibility in having caused Frachalla's earlier discharge had also been gained in conversation with others, and this evidence is also undisputed (J. A. (1) 39-41). Therefore, even after all other reasons given by Haggerty and Frachalla are discredited—which they should not be—the fact that Burns had previously caused Frachalla's discharge constituted *an affirmative and positive motivating factor resulting in Burns' own discharge.* This factor alone, apart from any others, negates the inference that Burns was discharged for unlawful reasons.

the circumstances herein, that resolution is entitled to but little, if any, weight (pps. 35-39).[14]

The Board and Burns seem to believe that they are entitled to have this Court "rubber stamp" the Board's latest order. While even the Board has conceded that the record contains a mass of evidence "cutting against the conclusion of the Board and its Examiner" (p. 26), it would nevertheless have this Court disregard any evidence contrary to its position and also the full application of the substantial evidence test, which requires an evaluation *on the whole record*, taking *"into account contradictory evidence or evidence from which conflicting inferences can be drawn"* and whatever in the record *"fairly detracts from its weight, * * * including the body of the evidence opposed to the Board's view* [emphasis added]." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-478. Furthermore, the Board's admission as to "evidence cutting" against its conclusion coupled with its *sua sponte* reversal herein indicates that, even in the Board's view, the evidence at best affords but a tenuous foundation for its findings. Accordingly, this Court has said it will scrutinize the entire record with care; that it will set aside the findings of the Board if not supported by substantial evidence. *Joy Silk Mills* v. *NLRB*, 87 U.S. App. D. C. 360, 185 F. 2d 732, 738, cert. den. 341 U.S. 914. Upon a careful scrutiny of the entire record, we feel confident that this Court cannot "conscientiously" find, as it must (*Universal Camera Corp.* v. *NLRB*, *supra*, at p. 488), that the Board's latest order meets the requirements of the substantial evidence test.

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14. Parenthetically, we would also call the Court's attention to the fact that the Examiner consistently misspelled Frachalla's name in his Report, despite the fact that it appears correctly spelled countless times in the transcript. It appears, therefore, that the Examiner may not even have bothered to view the transcript in preparing his Report. On the basis of its lack of objectivity and quality, this must be considered a distinct possibility. Another possibility, however, is that he did view at least parts of the transcript—such as Burns' testimony, only—and that he failed to observe the correct spelling of Frachalla's name. We would therefore submit that any observations of any kind alleged to have been made by the Examiner—such as demeanor observations—should be considered suspect.

III. THE BOARD'S REMEDY IS INAPPROPRIATE IN THE EVENT THIS COURT DETERMINES THAT THE BOARD'S SUPPLEMENTAL DECISION AND ORDER SHOULD BE ENFORCED.

A. Petitioner at All Times Preserved Its Rights Under Section 10(e) of the Act to Attack the Board's Backpay Order Before This Court.

After the Trial Examiner issued his Intermediate Report in the instant case, petitioner filed timely exceptions with the Board to, *inter alia*, the remedy contained therein and the order recommended by the Examiner.[15] In consideration of petitioner's exceptions and supporting brief, which was also filed with the Board, the latter, of course, on April 22, 1963, dismissed in its entirety the complaint against petitioner.

Following this Court's remand incident to Burns' petition for review of the Board's order of dismissal, the Board, on July 28, 1964, issued a Notice to Show Cause wherein it proposed, on its own motion, to set aside "its" prior order. After discussing in detail certain procedural and substantive considerations, the Board further proposed to adopt in all respects the findings, conclusions and recommendations of the Trial Examiner. However, no specific discussion appeared in the Board's Notice regarding the proposed remedy and, in any event, nothing was said to explicitly apprise petitioner that the Board did not intend to toll backpay.

In due course, petitioner filed an answer to the Board's Notice, responding to the same procedural and substantive considerations raised by the Board. However, petitioner did not specifically discuss the backpay aspects of the Board's proposed action for the following reasons:

15. See Exceptions (63) and (65) in the Excerpts from the Statement of Exceptions, found in the Joint Appendix herein.

1. Under all the circumstances herein, petitioner believed its previously filed exceptions to the remedy and recommended order of the Trial Examiner were sufficient to cause the Board to consider the tolling of backpay in any order that it, on its *own* motion, might issue. Furthermore, petitioner believed that said exceptions were sufficient under the circumstances to preserve to it all of its rights under Section 10(e) of the Act.

2. Inasmuch as the Board failed explicitly to discuss the proposed remedy in its Notice, and since it failed to affirmatively explicate therein that it would *not* toll backpay in the event that it did reverse "its" earlier dismissal, petitioner believed that, under all the circumstances herein, it was not waiving any rights under Section 10(e) of the Act by confining discussion in its response to those matters discussed in detail in the Board's Notice.

3. By objecting to the procedural and substantive aspects of the action proposed by the Board in its Notice, petitioner believed it was implicit and implied in its response that it objected also to the consequential remedial, or backpay, aspects of any order the Board might issue thereafter.

4. Petitioner believed that the Board would in any event consider on its *own* motion the question of tolling backpay if it ultimately *did* reverse its earlier decision. Under all the circumstances herein, petitioner further believed that it was not incumbent upon it to raise the issue of tolling, or to make application therefor, in order to preserve all of its rights in this connection before the Board and the Court.

When the Board issued its supplemental order, wherein it failed to toll backpay, petitioner's surprise and conster-

nation were immediately expressed to the Board's agent for compliance in the Chicago office. Petitioner contended to the Board's agent, *inter alia*, that the Board should properly have tolled backpay in the instant case, at least from the time of the Trial Examiner's Report to the date of issuance of the supplemental order. In the end, however, the Board's agent concluded that *full* backpay was due Burns—some $12,000 a year since May 1962—inasmuch as the Board, in its decision, had made "no reference as to whether or not backpay should be tolled for any period."[16]

Subsequently, after petitioner sought review of the Board's order, agreement was reached with the Board regarding the issues in the instant case. Accordingly, one of the issues agreed upon for presentation to this Court was the question concerning the appropriateness of the Board's backpay remedy herein. However, following verbal agreement in this regard, the Board reneged on its prior agreement in that it refused to make the appropriateness of the Board's backpay remedy an issue in the prehearing conference stipulation herein. Petitioner's frustration and irritation with the Board's then most recent outrage was expressed to its agent by letter dated April 7, 1965.[17] Naturally, no reply of denial was ever received.

In context with the foregoing, and under all the circumstances herein, we submit that petitioner is not now precluded under Section 10(e) of the Act from attacking that facet of the Board's order wherein it has failed to toll backpay. If there was ever any obligation at all upon petitioner to raise the issue of tolling with the Board incident to its last order, petitioner clearly did so. And while the Board argues an absence of "extra-

16. See letter of Compliance Officer Richard B. Simon, dated December 22, 1964, in Joint Appendix.

17. See letter to Marcel Mallet-Prevost, dated April 7, 1965, in Joint Appendix.

ordinary circumstances" herein, these are clearly present.[18]

B. That Portion of the Board's Order Awarding Burns Full Backpay Is Punitive and Wholly Inequitable; it Constitutes a Clear Abuse of Discretion and Should Be Modified.

There can hardly be any question concerning petitioner's reliance upon the Board's original dismissal of the complaint herein as justification for not having reinstated Burns to petitioner's employment. The propriety of petitioner's reliance was reinforced and increased, in fact, as the Board defended its original Decision and Order before this Court incident to Burns' petition for review in No. 18,054. Petitioner continued to place reliance upon the Board's dismissal even after it set aside "its" original decision. Such reliance continues up to the present time, for the Board's *sua sponte* reversal of "its" original decision was made wholly outside the scope of the mandate given the Board on remand by this Court.[19] Thus, inasmuch as the Board has patently traveled outside the orbit of its authority, this Court need not enforce the Board's latest order in any event, since "there is legally speaking no order to enforce." Cf. *NLRB* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388. Hence, we submit that petitioner continues to be justified in relying upon the Board's original dismissal of the complaint herein.

18. While the Board now contends petitioner could have filed a motion for reconsideration after being surprised by the Board's full backpay order, petitioner might well have done so except: (1) for the adamant insistence of its agent for compliance that *full* backpay was required; and (2) the Board's earlier agreement to stipulate backpay as an issue in the case before the Court. In any event, neither the Act nor the Board's Rules require that a question of law created by the Board's order be raised initially before the Board by a request for reconsideration. Procedural fairness would appear to prohibit foreclosure of consideration of the question in issue. Cf. *NLRB v. Richards*, 265 F. 2d 855, 862 (C. A. 3).

19. The impropriety of the action of the Board majority in reversing its original decision was shared by at least one Board member (Notice 2).

Even if this Court determines that the Board's current order merits enforcement in the present posture of the case, petitioner's continued reliance on the Board's earlier dismissal of the complaint is, under all the circumstances herein, reasonable and justified.[20] We submit, therefore, that the Board's present order should be modified to toll backpay during the period from the date of the Board's original decision to whatever date this Court may enforce that order. We further submit that such modification is appropriate here because it would be inequitable and punitive to compel petitioner to pay Burns full backpay.

The arbitrary character of the Board's full backpay demand is patently evident when consideration is afforded the fact that the Board *from the outset* sought full backpay from the petitioner (Notice 1). Thus, even before it reversed its original decision on its own motion, the Board proposed to award Burns full backpay based on its inarticulated conclusion that petitioner had not acted in justifiable reliance on "its" original decision. The punitive and inequitable nature of the backpay order herein is further borne out by the Board's action in refusing to toll backpay in the order now sought to be enforced coupled with its agent's subsequent refusal to consider tolling, or even to ascertain the facts concerning the extent of petitioner's reliance on the Board's original

20. The Board's labored *post ad hoc* conjecture that petitioner placed no reliance upon the original dismissal of the complaint in deciding not to rehire Burns (Bd. brief, pps. 34-35) is unsupported by the facts and cannot stand analysis. Contrary to the Board's contention, we did not argue in our opening brief that *the Board* erred in requiring Burns' reinstatement regardless of whether he was discharged for unlawful reasons. Unlike the tolling problem herein, petitioner has not previously raised the reinstatement disqualification issue *with the Board*. Counsel for petitioner now raises this issue with *the Court* for the *only* reason that we believe it our duty to call this Court's attention to a case involving a sister court, which, on the basis of misconduct of a lesser nature than that found herein, refused to enforce that portion of a Board order requiring an employer's reinstatement of a discriminatee even though it enforced the rest of the order. See *NLRB* v. *National Furniture Mfg. Co.*, 315 F. 2d 280 (C. A. 7), enf. as modified, 134 NLRB 834. It appears, incidently, that reinstatement was denied by the court even though the employer did not file exceptions in this regard with the Board.

decision. Instead, the Board now lamely gropes for *post ad hoc* support to rationalize its synthetic argument regarding petitioner's alleged nonreliance on the Board's original dismissal of the complaint herein.

While the Board's brief contains protracted discussion regarding the applicability to the facts herein of its holding in *A.P.W. Products Co., Inc.*, 137 NLRB 25, the facts of that case are easily distinguished. There, the Board was addressing itself to the problem of tolling backpay between the period of a favorable Trial Examiner's decision and its subsequent disaffirmance by the Board. Here, however, the tolling problem arises because of the Board's demand for full backpay where it on its *own* motion incident to a remand for "clarification," set aside an earlier decision favorable to petitioner while issuing a second decision reversing the first.[21] In any event, the Board stated in *A.P.W. Products Co., Inc., supra*, at p. 31, n. 10, that it would continue to toll backpay "where circumstances warrant it." In the instant case, however, the arbitrary and punitive character of the Board's full backpay demand is shown by its refusal even to consider whether the circumstances herein warranted tolling.[22]

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21. This fact alone clearly distinguishes each of the cases cited by the Board at the top of p. 33 of its brief, for each of these cases involved a remand upon *reversal* by a court of appeals. Furthermore, while the Board contends at p. 32 that backpay was never tolled in the past where it had found no violation and reversal by a court of appeals followed thereafter, the fact is that tolling has occurred in this situation. See, e.g., *Oregon Teamsters' Security Plan Office*, 113 NLRB 987, 119 NLRB 207. In any event, the Board's general failure to toll in this situation has resulted in the present Board characterizing such action as "quite inconsistent" with its general tolling practice in other prior situations. *A. P. W. Products Co., Inc., supra*, at p. 29.

22. In its brief, the Board attempts erroneously to analogize its general refusal to toll as comporting with private litigation, where tolling is allegedly unknown where a judgment is reversed on appeal (Bd. brief, pps. 31-32). Here, however, this Court has *not* reversed the Board's earlier decision dismissing the complaint herein. Moreover, the instant case is not a suit at common law or in the nature of such a suit. It is a statutory proceeding. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. And contrary to the present Board's notions, the Board was established to effectuate public policy—not to enforce private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265, 267, 268; *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 362.

In decreeing enforcement, the courts of appeal do not act as mere ministerial agencies to execute Board orders. *NLRB* v. *Central Mercidita, Inc.*, 273 F. 2d 370, 372 (C. A. 1). Such courts are vested with equitable powers. *NLRB* v. *Cheney Lumber Co.*, 327 U. S. 385, 390; *Ford Motor Co.* v. *NLRB*, 305 U. S. 370, 373. Accordingly, a reviewing court may adjust its relief to the exigencies of the case in accordance with the principles of equity governing judicial action. *Ford Motor Corp.* v. *NLRB*, *supra*. See also *Hecht Co.* v. *Bowles*, 321 U. S. 321. Thus, the relief sought must be consistent with the basic principles underlying the exercise of equitable jurisdiction, which are flexibility rather than rigidity and relief molded to fit the needs of the particular case. See: *NLRB* v. *Central Mercedita, Inc.*, 273 F. 2d 370, 373 (C.A. 1); *NLRB* v. *Marshall Maintenance Corp.*, 320 F. 2d 641, 644 (C.A. 3), and cases cited therein. Clearly, the arbitrary, punitive and inequitable character of the Board's full backpay order under the circumstances herein constitutes a clear abuse of Board discretion and warrants relief for petitioner from this Court.[23]

23. In addition to our previous discussion on this point (pet's open. brief, pps. 41-46), the Court should consider the Supreme Court's admonition in *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, that the Board's power to order backpay does not vest it with unlimited discretion to devise punitive measures and thus devise penalties and fines which the Board may think would effectuate the policies of the Act. The authority to order affirmative action by an employer does not go so far as to allow the Board to inflict any penalty it may choose simply because the Board believes the policies of the Act may be effectuated by such an order. As the Court stated at p. 12: ". . . the power to command affirmative actions is remedial, not punitive." See also *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 235-236; *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 267, 268.

CONCLUSION.

For the foregoing reasons, petitioner respectfully requests this Court to grant the relief requested in petitioner's opening brief (p. 47).

Respectfully submitted,

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,222

FERRELL HICKS CHEVROLET, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 18,051

ANDREW BURINSKAS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

FERRELL HICKS CHEVROLET, INC., INTERVENOR

On Petition to Review and Set Aside and Cross-Petition to Enforce an Order of the National Labor Relations Board After Proceedings Pursuant to Remand

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STATEMENT OF QUESTIONS PRESENTED

As set forth in the prehearing conference stipulation, the questions from the viewpoint of the Board are Nos. 1 and 2 on the first page of petitioner's brief.

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AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

These cases, consolidated by order of the Court, are before the Court on petition of Ferrell-Hicks Chevrolet, Inc., hereafter called the Company, to review and set aside a supplemental decision and order of the National Labor Relations Board, issued after proceedings pursuant to this Court's remand opinion issued January 8, 1964, in No. 18,054, *Andrew Burinskas* v. *N.L.R.B.* (*Ferrell-Hicks Chevrolet, Inc., Intervenor*). In its Answer, the Board has requested that its supplemental order, reported at 149 NLRB No. 130, be enforced in full. This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73, Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[1]

A. The Board's findings of fact

The Board's initial Decision and Order (J.A. 23-27) in this proceeding are reported at 142 NLRB 154.[2] Briefly stated, the underlying facts as found therein by the Trial Examiner and here adopted by the Board are these:

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[1] The relevant statutory provisions are reprinted in an appendix to the Company's brief.

[2] "J.A." references are to the Joint Appendix in No. 18,054, *Burinskas* v. *N.L.R.B.* and "Tr." references are to the transcript of testimony. When, in a series of references a semi-colon appears, references preceding the semi-colon are to the Board's finding of fact, those following to the supporting evidence.

1. *Burns' Union activities prior to the election*

Andrew Burinskas (also known as and hereinafter referred to as Andy Burns) was employed by the Company as an automobile salesman from September 1955, until his discharge on May 10, 1962. It is undenied that he was one of the Company's best salesmen. Thus, for several years prior to his discharge he had achieved membership in Chevrolet's Hall of Honor Club for salesmen and had been awarded numerous prizes. At the Christmas party preceding his discharge, when all the Company's salesmen were awarded bonuses based on the amount of their sales, Burns' bonus was exceeded by only one other salesman. (J.A. 7, 14; Tr. 7-9, 71-74)

In July 1961, Burns joined the Automobile Salesmen's Union of Chicago and Vicinity (hereafter the "Union") and the same month became chairman of its organizing committee. In this capacity, he solicited membership in the Union, distributed Union literature, and filed petitions with the Board seeking representation elections among salesmen of a number of Chicago area auto dealers, including the Company. Burns represented the Union at the consolidated hearing on these petitions and gave testimony. On November 27, 1961, the Board's Regional Director ordered an election to be held among the Company's salesmen. The election was subsequently scheduled for December 20, 1961. (J.A. 7; Tr. 9-14).

The day after that assigned by the Board's Regional Director for the posting of election notices, Burns asked Bert M. Ferrell, president of the Company, about the absence of these notices. Ferrell, after ex-

plaining that the notices had been delivered late, gave them to Burns for posting. While Burns was so engaged, Ferrell passed by and, looking at Burns, said: "No son of a bitch is going to tell me how to run my business." When asked by Burns to repeat what he had said, Ferrell did. Burns walked away. (J.A. 7-8; Tr. 16-17).

In May 1961 the Company had announced that Christmas bonuses would be paid, computed on the basis of cars sold during the period from April to December, 1961 (J.A. 31). On Friday or Saturday, December 15 or 16, Ferrell told Burns that the Company Christmas party, at which the bonuses would be distributed, was to be held on Tuesday, December 19. Burns protested that the Company could not hold the party "this close to the election" because of a "ruling * * * pertaining to 24 hours before election time when [he could] not throw this party."[3] Ferrell said he would check. A short while later Ferrell told Burns he was right and that the party had been rescheduled for Monday, December 18. When Burns asked Ferrell why the party was not to be held on the preceding Friday or Saturday, Ferrell said that he thought "the men [would] enjoy it on a Monday." (J.A. 8; Tr. 27-29).

A few days before the election, the Company sent a letter to all its salesmen other than Burns, over Ferrell's signature, referring to the relationship of salesmen and Company as a marriage and stating that they could not afford to have a third party come in to break up this marriage. (J.A. 8; Tr. 430-435).

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[3] See *Peerless Plywood Co.*, 107 NLRB 427.

During the election held at the Company place of business on December 20, Burns, acting as the Union's observer, saw Ferrell in the area where the balloting was taking place. He said, in the presence of Isabel Laban, the Company's bookkeeper and observer at the election, "Get that son of a bitch out of here". This remark was immediately reported to Alma Klinnicke, the Company's business manager, and Jack Haggerty, the Company's new car sales manager. (J.A. 9; Tr. 301-302, 304, 312-314). Nothing, however, was said to Burns (J.A. 15).

The Union was unsuccessful in the election held at the Company. It was, however, certified by the Board as bargaining representative at two other dealerships (J.A. 8)

2. Burns' Union activities after the election

The day after the election, Ferrell told Burns to forget about the election and that he had instructed the other salesmen not to tease him. Burns complained that he was really hurt by the election results and said he felt that "it was [the Company's] money that beat [him]" (J.A. 9; Tr. 32-33). Shortly thereafter, Burns sent a bulletin entitled, "Keep the Ball Rolling" to all the Company's salesmen, urging continued effort on behalf of the Union. Haggerty, seeing a copy of this, called Burns to his office and said he thought Burns was through with the Union. Burns told him to wait for the results of the next series of elections at the other auto dealers later in the month, and then Haggerty would know if he were "through or not". (J.A. 9-10; Tr. 34-37, 352).

In January 1962 Burns circulated among the Company's salesmen copies of the Union's wage proposals to be submitted to the dealers at which it was certified. On seeing one of these, Haggerty observed to Burns that "it was economically impossible for a dealer in the Chicago area to pay that amount of money to their salesmen and stay in business." Haggerty also asked Burns again if he were through with the Union, and again received a negative response. (J.A. 10; Tr. 41-43, 74-75, 354).

Early in May 1962 Haggerty and Burns talked about what was "going on" with the Union. Burns said that negotiations with the other dealers were being unduly delayed by evasive tactics and that the "government [was] going to start looking into this". (J.A. 10; Tr. 52).

3. *Events at the time of Burns' discharge*

At a sales meeting on May 9, Haggerty, by referring to a sale made on May 7 by Thomas Frachalla, the Company's used car sales manager, sought to demonstrate to his salesmen that they ought not to classify a person who walked into the showroom as a non-buyer solely on the basis of his appearance.[4] Some of the salesmen complained that Frachalla had been wrong in taking the customer away from the salesmen. Burns commented: "Ah s--t, he's just trying to

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[4] On May 7, a young couple entered the showroom but were ignored by the four or five salesmen present. Frachalla greeted the couple and "within 30 minutes from the time they entered the door we were changing the plates to make delivery" of a used car. (J.A. 4; Tr. 202-204).

make a point," at which all the salesmen broke out laughing. Although Haggerty testified that Burns' remark "ruined the whole effect" of his talk, Alvin Herman, a salesman who testified as a Company witness, said that Haggerty joined in the laughter. (J.A. 10-11; Tr. 289-290, 333-335).[5]

Later that same day, Burns told Haggerty that Frachalla's action "was a stinko" and added: "Jack, Tom Frachalla is out to get your job".[6] Haggerty said he didn't believe it. Nothing was said about Burns' remark at the morning sales meeting. (J.A. 11, 16; Tr. 336-337).

Frachalla testified that since May 9 was his day off, he did not appear at the Company premises until about 8 p.m., when he stopped by to see if everything was in order. He met Haggerty and asked him how things had gone that day. Haggerty told him that the sale of May 7 "got kicked around and [that] Andy Burns told him to look out" for Frachalla. When Frachalla pressed Haggerty for more information, Haggerty told him that he was leaving to see a customer, and asked Frachalla to stop at his home later that evening. (J.A. 12; Tr. 207-208, 337).

Haggerty and Frachalla met at about 11 p.m. According to Haggerty, he told Frachalla about the sales-

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[5] Indeed, Herman's testimony was that Haggerty "couldn't" say anything following petitioner's remark since he was laughing (Tr. 289). Herman said that "[Haggerty] made so much noise laughing. We all busted out laughing." (Tr. 290).

[6] Frachalla had preceded Haggerty as new car sales manager, was discharged from that job, and, at Haggerty's suggestion, was rehired as used car sales manager (J.A. 25).

meeting and Burns' warning that Frachalla was out to get his (Haggerty's) job. (J.A. 12; Tr. 338-339). Frachalla then reminded Haggerty of an incident which had occurred two months earlier in which Burns had said that Haggerty "smile[s] with his teeth" but [one] could tell [he] wasn't sincere by looking into [his] eyes" and that Haggerty was trying to "start the Haggerty dynasty at Ferrell-Hicks" (J.A. 12; Tr. 339).[7] Haggerty testified that he next told Frachalla that Burns had, at the time of the election almost five months earlier, called Ferrell a "son of a bitch" (J.A. 12; Tr. 339). It was the testimony of the two managers that in light of these incidents, they decided to discharge Burns the following morning. (J.A. 12-13, Tr. 222, 339)[8]

Burns was not fired, however, until around five o'clock the following afternoon, when he was called into an office by Haggerty and Frachalla. Frachalla said that he did not quite know how to begin but that he understood that Burns had made a statement about him to Haggerty; Burns admitted that he had. Frachalla then referred to the statement made by Burns to Frachalla about Haggerty, which Burns

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[7] This statement was given in response to Frachalla's question as to what Burns thought of Haggerty. Although Frachalla reported it to Haggerty within 30 minutes of its being made, Haggerty had never reprimanded Burns for it or even mentioned it to him (J.A. 12, 15; Tr. 65-66, 199).

[8] Frachalla testified that another reason for the discharge was that Burns had said, after Frachalla's earlier discharge as new car sales manager, "that Mr. Ferrell had fired me (Frachalla) to suit him (Burns): (J.A. 41, see also J.A. 25).

also admitted. When Burns asked "So what? Does this mean I'm fired", Haggerty confirmed that it did. Burns asked whether there was anything wrong with his work as a salesman, and Frachalla replied that he was a "wonderful salesman" but that "that wasn't it". Burns then accused Frachalla of having "made a lot of statements," including an obscene reference to Ferrell, but the discussion ended when Frachalla left the office. (J.A. 13; Tr. 56-59).

Burns thereafter filed a claim for unemployment compensation. On July 31, 1962, the Division of Unemployment Compensation for the State of Illinois determined that "it has not been shown that the claimant committed any act to cause dissension between employees" and that "[h]e was not discharged for misconduct connected with his work" (J.A. 13).

B. The Trial Examiner's Intermediate Report

The Trial Examiner found that the Company had discharged Burns because of his Union activities, thus violating Section 8(a)(3) and (1) of the Act (J.A. 14-18). In so finding, the Trial Examiner explicitly discredited as not "worthy of belief" (J.A. 16) the testimony of Haggerty and Frachalla that Burns was discharged because he had made disrespectful remarks about management officials and was attempting to create dissension between Haggerty and Frachalla. The Examiner stated (J.A. 16):

> Instead, consideration of the entire record, coupled with my observation of the demeanor of the witnesses involved as they testified, have brought me to the conclusion that they met clan-

destinely near midnight to concoct a defense having the appearance of legality, and to cover the true reason for Burns' discharge—his union activity.

C. The Board's original decision and the proceedings before this Court

On review, the Board (2-1, Chairman McCulloch dissenting) reversed the Trial Examiner's finding that Burns was discharged because of his Union activity and ordered the complaint dismissed. Most significantly, the Board stated (J.A. 23):

> The prime issue in this case is whether the Charging party, known as Andy Burns, was discharged for his union activities, or for what the Respondent regarded as good cause. The Trial Examiner credited Burns' testimony in many respects and discredited Respondent's witnesses who testified otherwise. Although we accept his resolutions of credibility based on demeanor, we are not required thereby also to adopt his conclusion that Burns was discharged because of Respondent's opposition to his activities on behalf of the Union.

When the case came before this Court, on Burns' petition to review and set aside the Board's order dismissing the complaint, Burns argued that the Board, having accepted the Trial Examiner's credibility resolutions—including his determination that Haggerty and Frachalla were lying when they testified that Burns was discharged because of his alleged misconduct—should also have accepted the Trial Examiner's conclusion that the reason for the dischrage was

Burns' Union activities.[9] Counsel for the Board, in response, argued that Burns misinterpreted the Board's decision and that the Board, although it had accepted the Examiner's other credibility resolutions, had not accepted his finding that Haggerty and Frachalla testified falsely as to the reason for Burns' discharge. To the contrary, it was argued, when the Board found Burns not to have been discharged because of his Union activities, it impliedly found Haggerty and Frachalla to have testified truly as to the reasons for Burns' discharge. In short, counsel for the Board argued that the Board had, in part, overruled the Examiner's credibility resolutions.[10]

On January 8, 1965, the Court, after oral argument, entered the following order:

> This cause having come on to be heard on petition to review an order of the National Labor Relations Board, and having been argued by counsel, and the court having had difficulty in apprehending the basis for the Board's Order by reason of ambiguities in its Decision deriving from the Board's treatment of the Examiner's findings with respect to the credibility of certain witnesses for the employer and uncertainty as to the extent to which the Board rejected the Examiner's inferences drawn from the evidence found credible.
>
> It is ORDERED by the court that this case is hereby remanded to the Board for reconsidera-

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[9] Brief for Petitioner in No. 18054, pp. 15-18.

[10] Brief for the National Labor Relations Board in No. 18054, p. 10.

tion of the Decision with a view to its clarification, with full opportunity to be afforded by the Board to all parties to be heard upon any action proposed to be taken by the Board as a result of this remand.

D. The Board's Supplemental Decision and order

Subsequent to the Court's remand, the Board (3-1, Member Leedom dissenting) issued a notice to show cause why it should not set aside its original order and adopt in all respects the findings, conclusions and recommendations of the Trial Examiner. In support of its action, the Board stated:

> As the Board Panel which originally considered this matter cannot be reconstituted, the questions presented by the Court's remand have been considered by the full Board.[11] A majority of the Board is now of the opinion that in accepting the Trial Examiner's resolutions of credibility based on the demeanor of the witnesses it should also have accepted the inferences which the Trial Examiner drew from the facts as he found them. The Trial Examiner discredited the testimony of Respondent's witnesses, Haggerty and Frachalla, as to their asserted reasons for discharging Burinskas. No credible reason for his discharge having been established, it follows that the inferences drawn by the Trial Examiner from the credited testimony of Burinskas are entitled to great weight. The contrary inferences drawn by the majority of members of the Board Panel

[11] The term of Member Rodgers, who was a member of the panel which originally decided the case, expired prior to the Court's remand. (Footnote added).

were based in part on an acceptance of discredited testimony, and for that reason are less supportable than the inferences of the Trial Examiner.

On December 9, 1964, the Board having considered the Company's answer to the notice to show cause, issued a supplemental decision and order, setting aside its original decision and order and adopting in full the findings, conclusions and order of the Trial Examiner. Thus, the Board's order requires the Company to cease and desist from discouraging membership in the Union or any other labor organization by discriminating against employees in regard to their hire or tenure of employment or any terms and conditions of employment or in any other manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed by Section 7 of the Act. Affirmatively, the Company is ordered to offer immediate and full reinstatement to Burinskas, to make him whole for any loss of pay suffered by him from the date of discharge to date of offer of reinstatement and to post the usual notices.

SUMMARY OF ARGUMENT

1. There is no merit to the Company's argument that this Court, by the terms of the remand order in No. 18054, sought to limit the Board to explaining how it arrived at its original decision, and to preclude the Board from reversing that decision, if, after clarifying the ambiguities therein, the Board were to conclude that its original decision was erroneous. In the

first place, there was inherent in the Court's unwillingness to affirm the Board's initial decision an implication that if the Board clarified the ambiguities in its decision, it might not reach the same result. This interpretation of the Court's order—that the Board was free either to affirm or reverse its original decision and order—is supported by the Court's direction to the Board to give full opportunity to all parties to be heard "upon *any* action proposed to be taken by the Board." For, by this language the Court appears to have contemplated a variety of possible actions to be within the Board's power, not the single duty to clarify its original decision. Finally, there appears to us no reason *why* the Court would have wished to preclude the Board from reversing its original decision if the Board, on reconsideration, were to decide that its original decision was erroneous. Indeed, to prevent the Board from reconsidering its decision on the merits prior to renewed review by this Court "would be inconsistent with the policy of allowing an agency to take corrective action before judicial review." *Pan American, Petroleum Corp.* v. *F.P.C.*, 116 U.S. App. D.C. 249, 254, 322 F. 2d 999, 1004.

2. Substantial evidence on the whole record supports the Board's finding that Burns was discharged because of his Union activities. Initially, it is hardly open to serious dispute that the Company knew that Burns was the leading Union activist among its salesmen and that it was opposed to the unionization of its salesmen. While Haggerty and Frachalla testified that Burns' discharge was not because of his Union

activities, but because he had made disrespectful remarks about management officials and was attempting to sow dissension among them, this testimony was properly discredited by the Trial Examiner, who pointed out that one of the examples of misconduct for which Burns was allegedly discharged had occured five months prior to his discharge, another had occurred two months prior thereto, and none of them had been regarded as sufficiently important even to be mentioned to Burns at the time they occurred. The only non-discriminatory reason for Burns' discharge testified to by Company officials having been shown to be false, the inference seems inescapable, in light of Burns' Union activities and the Company's opposition thereto, that the real reason for Burns' discharge was his Union activities.

3. The Company here argues that the Board's order is improper in that it: (1) does not provide for a tolling of backpay for the period between the Board's original decision finding of no violation and its supplemental decision reversing that finding; (2) requires that Burns be offered reinstatement. However, neither of these objections were raised before the Board, despite the fact that the Company had ample opportunity to do so. Hence the Company is barred by Section 10(e) of the Act from urging these objections here.

4. In any event, the Board's refusal to toll backpay was not an abuse of its broad remedial powers. In the first place, for the Board to toll backpay in the period from its original to its supplemental decision—that is, to relieve the Company of the obligation

to make Burns whole for his loss of earnings during that period—would benefit the wrongdoer at the expense of the wronged and would fail to achieve the "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. Indeed, this consideration recently led the Board to reverse its practice of tolling backpay between a Trial Examiner's decision recommending dismissal and a Board finding of a violation *A.P.W. Products*, 137 NLRB 25, 31, enforced, 316 F. 2d 899, 904 (C.A. 2).

Since *A.P.W.*, *supra*, the Board has tolled backpay only in those few cases in which it has been persuaded that the employer, in declining to offer reinstatement was acting in justifiable reliance on the Board's original decision. In the instant case, however, it is plain that the Company's refusal to reinstate Burns was predicated on its *own* views as to his suitability for employment, not on the Board's original decision. Hence, the Board was not acting arbitrarily in declining to toll backpay for the period from its original to its supplemental decision.

5. Finally, there is no merit to the Company's assertion that Burns' reinstatement should not be ordered because of his disrespectful attitude and improper conduct towards his supervisors. The Company did not regard this conduct as sufficiently serious to call for so much as a reprimand prior to Burns' discharge for Union activities; it can hardly argue subsequent thereto that this conduct was of such gravity as to require that he be denied reinstatement—es-

pecially since reinstatement is "the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union." *Local 833, UAW-AFL-CIO* v. *N.L.R.B.*, 112 U.S. App. D.C. 107, 111, 300 F. 2d 699, 703, cert. denied, 370 U.S. 911.

ARGUMENT

I. The Court's Remand Order Did Not Preclude the Board From Reconsidering the Merits of Its Original Decision

As set forth in Counterstatement, this Court remanded the instant case to the Board "for reconsideration of the Decision with a view to its clarification." On remand, the Board clarified its original decision by stating that the majority of the panel which first considered the case had not accepted the Trial Examiner's credibility resolutions *in toto*, but had rejected his determination that Haggerty and Frachalla testified falsely as to their reasons for discharging Burns. Thus the Board stated:

> The contrary inferences drawn by the majority members of the Board panel were based in part on an acceptance of discredited testimony . . .

In other words, the Board resolved the dispute over the interpretation of its original decision by pointing out, as Board counsel had argued to the Court, that the majority had, in part, overruled the Examiner's resolutions of credibility.

The Board did not, however, stop at this point. Rather, having determined that the majority of the

original panel had relied on discredited testimony, despite established policy that the Board will "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect," [12] the Board re-examined the original decision on the merits. On such re-examination the Board concluded that the original decision, based in part on an acceptance of discredited testimony, was less supportable than the Trial Examiner's decision, and that the latter was entitled to stand. Accordingly, as has been noted, the Board adopted the Trial Examiner's findings, conclusions and recommendations.

The Company, in addition to its argument that the Board's supplemental decision is unsupported by substantial evidence on the record as a whole (an argument discussed *infra* at pp. 21-27), also contends that the Board was without power, under the terms of this Court's remand, to reconsider the merits of its original decision. Rather, the Company argues, the Board was free solely to explain how it had arrived at its original decision. We submit that this contention is without merit.

It is, of course, apparent that the reason for the Court's remand was its "difficulty in apprehending the basis for the Board's Order by reason of ambiguities in its decision." Thus, as the Company stresses, the

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[12] *Standard Dry Wall Products*, 91 NLRB 544, 550, enforced, 188 F. 2d 362 (C.A. 3). Accord: *M & S Company*, 108 NLRB 1193; *Baltimore Steam Packet Co.*, 120 NLRB 1521, 1524; *Galis Electric & Machine Co.*, 142 NLRB 222, 223, n. 1.

Court ordered this case remanded to the Board "for reconsideration of the Decision with a view to its clarification." But, the question remains did the Court, by the terms of the remand, intend to forbid the Board, on reconsideration, from reversing its original decision if, after clarification, the Board were to conclude that its original decision was erroneous? We think the answer is plainly not.

In the first place, we think there was inherent in the Court's unwillingness to affirm the Board's initial decision an implication that if the Board clarified the ambiguities in its decision, it might not reach the same result. Indeed, it was the thrust of Burns' argument to this Court that the Board, in reaching its original conclusion, had disregarded the necessary implications of its apparent acceptance of the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to their reasons for discharging him, and that if the Board thought the matter through it would have concluded, as had the Examiner, that the real reason for the discharge was Burns' Union activities.[13] Thus, as the Board read the Court's remand, it was to reaffirm its original decision only if, after clarification of the ambiguities in that decision, it regarded its original conclusion as proper. Otherwise, the Board was free to (and expected to) reverse itself.

This interpretation of the Court's order—that the Board was free either to affirm or reverse its original decision and order—is supported by the Court's direction to the Board to give full opportunity to all par-

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[13] Brief for Petitioner in No. 18054, pp. 15-18.

ties to be heard "upon *any* action proposed to be taken by the Board as a result of this remand." (Emphasis supplied). For by this language the Court appears to have contemplated a variety of possible actions to be within the Board's power, not the single duty to clarify its original decision. In other words, if the Board were limited to the power to clarify its original decision, the Court surely would have so stated, rather than say the Board should permit the parties to be heard on "any action" proposed to be taken by it as a result of the Court's remand.

Finally, and perhaps of most significance, there appears to us no reason *why* the Court would have wished to preclude the Board from reversing its original decision if the Board, on reconsideration, were to decide that its original decision was erroneous. That is, we are unable to perceive any policy that would be furthered by requiring the Board to stand on a decision it no longer regarded as correct, much less defend such a decision before this Court. Indeed, to prevent the Board from reconsidering its decision on the merits prior to returning to this Court for review "would be inconsistent with the policy of allowing an agency to take corrective action before judicial review." *Pan American Petroleum Corp.* v. *F.P.C.*, 116 U.S. App. D.C. 249, 254, 322 F. 2d 999, 1004; cf. *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Ford Motor Corp.* v. *N.L.R.B.*, 305 U.S. 364; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 199-201. For this reason, as well as those previously stated, the Board was justified in interpreting the Court's remand as permitting it to reverse its original deci-

sion, if, after clarifying that decision, it were to decide that its original decision was erroneous."

II. Substantial Evidence on the Whole Record Supports the Board's Finding That Burns Was Discharged Because of His Union Activities

Initially, it is undisputed that the Company was aware of Burns' activities on behalf of the Union. Burns was chairman of the Union's organizing committee, and Union literature distributed to Chicago area automobile salesmen, including those of the Company, bore his signature. He signed and filed the Union's petition for a representation election among the Company's employees, testified on behalf of the Union at the hearing on the petition, and was the Union's official observer when the election was held. Nor did Burns' activities on behalf of the Union cease with the Union's election defeat. Shortly after the election, Burns drafted, signed and distributed among the Company's employees a bulletin entitled "Keep the Ball Rolling," which urged continued Union organizational activity. When Haggerty saw a copy of this bulletin, he told Burns he thought the latter was through with the Union, to which Burns replied that

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[14] The Company asserts that the Board's reconsideration of its original decision in this case is contrary to the Board's position that it will not entertain requests for reconsideration "based solely on the ground of a change in the composition of the Agency's membership." *Wagner Iron Works*, 108 NLRB 1236, 1239. Reconsideration here was not, however, based on a change in Board membership, but on the fact that this Court had remanded the instant case to the Board for the purpose of reconsideration.

Haggerty would soon see if he were "through or not." Subsequently, in January 1962, when Burns distributed to the Company's employees copies of the wage proposals the Union was submitting to the dealers at which it was certified, Haggerty again asked Burns if he was through with the Union and again received a negative response. Finally, in May 1962, a few days before Burns' discharge, Haggerty and Burns again talked about what was "going on" with the Union. In short, not only was the Company aware of Burns' Union activities, but to the Company, as well as its salesmen, Burns *was* the Union.

Secondly, it is hardly open to question that the Company was opposed to the unionization of its salesmen. Indeed, this may be putting it mildly. Thus, when Company President Ferrell saw Burns posting election notices, he said to Burns, in an obvious reference to the Union, "No son of a bitch is going to tell me how to run my business." Furthermore, a few days before the election, the Company sent a letter to all its salesmen, except Burns, referring to the relationship between the Company and its salesmen as a marriage and saying they could not afford to have a "third party" break up the marriage.

In light of these facts, the crucial question in the case is, quite plainly, whether Haggerty and Frachalla were telling the truth when they testified that Burns was discharged because he had made disrespectful remarks about management officials and because he was attempting to create dissension between Haggerty and Frachalla. For if they were not, the inference seems inescapable, in the circumstances of this case,

that the real reason for the discharge was Burns' Union activities. See *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9) ("It is well settled that the inferences drawn by the Board [as to a discriminatory motive for discharge] are strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny.")

The Trial Examiner, who saw and heard the witnesses, concluded that the testimony of Haggerty and Frachalla as to the reason for Burns' discharge was not "worthy of belief" (J.A. 16). The Board, on reconsideration, determined that the Trial Examiner's credibility resolutions were entitled to stand. Thus, the Company is in the unhappy position of attacking credibility resolutions made by a Trial Examiner and affirmed by the Board before a Court which has held that "credibility of witnesses is a matter for Board determination and not for the court" (*Joy Silk Mills* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 369, 185 F. 2d 732, 741, cert. denied, 341 U.S. 914). We submit that the Company has shown nothing that would warrant this Court in overruling the Board's determination in the instant case.

Thus while Haggerty and Frachalla testified that Burns was discharged because of various incidents involving alleged disrespectful remarks about management officials and attempts to create dissension between Haggerty and Frachalla, it is important to note that not one of these incidents was regarded as of sufficient significance even to be mentioned to Burns at the time they occurred. As the Trial Examiner stated (J.A. 15-16):

The first "disrespectful" remark on which Respondent relies is the indecent remark about Ferrell made by Burns to LaBan on the morning of the election on December 20, 1961. The record does not disclose that Ferrell was ever advised of Burns' disrespectful inquiry to LaBan and, though it was reported to Haggerty within a few hours after it was made, the latter apparently did not deem it of sufficient gravity to mention it to, criticize, or admonish, Burns therefore (sic) until he was fired 5 months later.

Turning now to the alleged "dissension" caused by Burns—setting Franchalla (sic) and Haggerty off, one against the other—the first evidence of this alleged campaign to create dissension, Respondent contends, concerns Burns' statement to Franchalla about Haggerty's lack of sincerity a day or two after Franchalla was hired as used car manager on March 7, 1962. Viewing this accusation in a light most favorable to Respondent, I cannot attribute to it the implication now drawn therefrom by Respondent. It was an evaluation of Haggerty, solicited by Franchalla, an opinion which Burns apparently entertained. And, though Franchalla testified that he reported the remark to Haggerty within an hour or two after it was made, Haggerty was not sufficiently disturbed thereby to discuss or even mention it to Burns until he discharged him 2 months later.

There remain for consideration the last incidents upon which Respondent relies—Burns' remark at the sales meeting of May 9, and his statement to Haggerty later during the same day that Franchalla was "out to get [his] job." With respect to Haggerty's reaction to Burns' remark

at the sales meeting and the part it allegedly played in calling the nocturnal session with Franchalla, I am not persuaded that Haggerty considered it so provocative as to require action by him. Indeed, the laughter which it apparently induced, and in which Haggerty joined, helped to put an end to a discussion of whether Franchalla had unduly deprived a salesman of the commission on the car Franchalla sold on May 7. And, though Haggerty testified to a conversation he had with Burns a few hours after the conclusion of the sales meeting on May 9, the record fails to disclose that he then criticized Burns for his remark during the meeting, or otherwise indicated any displeasure concerning Burns' conduct thereat.

* * *

I am convinced, and find, that Burns' remark at the sales meeting and his later statement to Haggerty did not meet with such resentment by Haggerty as to induce the near midnight meeting for an objective and honest consideration of those incidents. Indeed, when Burns made the remark about Franchalla, Haggerty figuratively shrugged it off as mere gossip by telling Burns he did not believe it, and without even deigning to inquire of him the basis for his accusation against Franchalla.

Instead, I am convinced that during the afternoon Haggerty realized that Burns' accusation against Franchalla presented him with an opportunity to utilize it as plausible, without disclosing the real reason for getting rid of the chairman of the Union's organizing committee thereby crippling, if not completely destroying, further union activity among Respondent's salesmen. . . .

We submit that the foregoing analysis is sound, that the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to their reason for discharging Burns is entitled to stand,[15] and that it was eminently reasonable for the Board, having accepted the Examiner's credibility resolution, to accept his further finding that the real reason for the discharge of Burns was his persistent Union organizational activity. This is not, of course, to say that the record is devoid of evidence cutting against the conclusion reached by the Board and its Examiner. Such evidence exists and both we and the Company have discussed it at some length.[16] The question in the instant case is not, however, whether substantial evidence would support a conclusion contrary to that reached by the board, but whether substantial evidence supports the conclusion actually reached—that Burns was discharged for his Union activities. We submit that substantial evidence does support that conclusion and that the existence of conflicting evidence, even if sufficiently substantial that the Court might justifiably have reached a different choice had the matter been before it *de novo* is no basis for declining to

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[15] An additional reason given by Frachalla as motivating Haggerty and Frachalla in discharging Burns was that Frachalla believed Burns to have caused his earlier discharge as new car sales manager. The Trial Examiner, who did not explicitly refer to this testimony, apparently discredited it on the basis of demeanor as well as his having found Frachalla to have testified falsely in all other respects.

[16] See Brief for Petitioner in No. 19,222, pp. 21-41; Brief for the National Labor Relations Board in No. 18,054, pp. 12-18.

affirm the Board's findings. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, reaffirmed in *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404.[17]

III. The Company's Failure to Object to the Board's Remedy in the Proceedings Before the Board Bars It From Raising Any Objection Thereto Before This Court; In Any Event, the Remedy is Not Improper

A. *Section 10(e) of the Act bars the Company's attack on the Board's order*

The order recommended by the Trial Examiner in the instant case required that the Company (J.A. 20):

> offer Andrew Burinskas immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he would have earned as wages from the date of discrimination against him to the date of offer of reinstatement . . . .

Following this Court's remand, the Board, on July 28, 1964, issued a Notice to Show Cause why its previous order dismissing the complaint should not be set aside and an Order issue "adopting in all respects the find-

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[17] The Company's attacks on Burns' credibility as a witness (Brief, pp. 23, 25-28, 37-38) are totally irrelevant as none of the crucial factual findings on which the Board's decision rests—the Company's knowledge of Burns' Union activity, its opposition thereto, and the false reasons given by Frachalla and Haggerty for the discharge—rest on Burns' testimony.

ings, conclusions, and recommendations of the Trial Examiner." The Company filed a response raising in detail certain procedural and substantive objections to the proposed action. It did not, however, raise any objection to the Board's proposed adoption of the Trial Examiner's recommended remedy. In the absence of such objection, the Board, after finding the specific objections without merit, adopted the recommended remedy *in toto*. No motion for reconsideration was filed by the Company; instead, this review proceeding was begun.

In its brief to this Court, the Company, for the first time, argues that even if the Board's finding that Burns' discharge was unlawful is proper, the Board should not have required the Company to reinstate Burns with backpay from the date of his discharge. Rather, the Company argues, the Board should have: (1) tolled backpay during the period from its original decision dismissing the complaint to its supplemental decision finding Burns to have been discriminatorily discharged; (2) declined to order Burns' reinstatement.

We submit that the Company, having failed to raise either of these objections to the Board's order in the proceedings before the Board, is barred from doing so before this Court by virtue of Section 10(e) of the Act, which provides:

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

See *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385; *Marshall Field* v. *N.L.R.B.*, 318 U.S. 253; *Carpenters District Council of Detroit* v. *N.L.R.B.*, 109 U.S. App. D.C. 209, 213-214, 285 F. 2d 289, 293-294; *N.L.R.B.* v. *Izzi*, 343 F. 2d 753 (C.A. 1).

Nor do there exist in the instant case any extraordinary circumstances that would excuse the Company's failure to file objections to those portions of the Board's order it now attacks. When the Board issued its notice to show cause, it explicitly stated that it proposed to issue an order "adopting in all respects the findings, conclusions and recommendations of the Trial Examiner." Included among these recommendations was that the Company take precisely the action it here objects to—offer Burns reinstatement and give him backpay from the date of discrimination to the date of offer of reinstatement. Thus the Company can hardly claim that it did not have fair warning of what the Board proposed to do and ample opportunity to except thereto if it wished the Board to consider its exceptions. Nor, even assuming the Company was surprised by the Board's supplemental order (an assumption we find quite inconceivable), did the Company file a request with the Board that it reconsider its order in light of the objections here presented. Under these circumstances, we submit that the Company cannot raise these objections now. In any event, as we next show, the Board's order is, on its merits, entitled to enforcement.

B. *The Board's refusal to toll backpay was wholly proper*

It has long been recognized, and recently reaffirmed in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215-216, that the Board's remedial power is a broad discretionary one, subject only to limited judicial review. *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. "The relation of remedy to policy is peculiarly a matter for administrative competence . . ." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than these which can fairly be said to effectuate the policies of the Act" *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 540. We submit that no such showing has been made in this case.

In the first place, for the Board to toll backpay in the period from its original decision to its supplemental decision—that is, to relieve the Company of the obligation to make Burns whole for his loss of earnings during that period—would benefit the wrongdoer at the expense of the wronged and would fail to achieve the "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194). This consideration recently led the Board to reevaluate its tolling practices, and to reverse the policy announced in *E. R. Haffelfinger Co., Inc.*, 1 NLRB 760, under which the Board tolled backpay for the period between a Trial Examiner's decision recommending dismissal and a Board

finding of a violation. *A.P.W. Products Co.*, 137 NLRB 25, 31, enforced 316 F. 2d 899, 904 (C.A. 2). The Board stated in *A.P.W.* (137 NLRB at 29):

> The sole and, in our view, unpersuasive reason given when the practice of tolling backpay was instituted was that "in view of the Trial Examiner's recommendations, respondent could not have been expected to reinstate the discharged men after it received the Intermediate Report . . . and therefore it should not be required to pay backpay from that time to the date of this decision." While this reasoning at first glance may appear to have an equitable basis, it does not bear analysis. Rather, its real thrust is in the direction of benefiting the wrongdoer at the expense of the wronged—a result antithetical to the fundamental aim of the Board's remedial authority and powers. Specifically, the blameless discriminatees are not made whole for their monetary loss for the full period of the discrimination and are to that extent punished for exercising their statutory rights under Section 7, solely because of the erroneous conclusion reached by the Trial Examiner. On the other hand, the particular respondent, who is responsible for the wrong committed, is, to the extent of the tolling, relieved of its obligation to restore the discriminatees to the *status quo ante* and thus is permitted to profit by its violations of the Act—the respondent's benefit being both in the monetary sense and in the advantage it may enjoy by reason of the delay in returning unwanted employees to the plant.
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> In contrast with the Board's practice of tolling, we know of no other legal proceeding in which a similar benefit is given to the offending party

> by reason of an earlier recommendation or finding in that party's favor. Thus, in private litigation before the courts, a defendant who has won in the court below is afforded no advantage thereby if that judgment is reversed on appeal and a later decision is reached in favor of the plaintiff. If damages are liquidated, interest continues to run for the entire period during which payment of the fixed sum has not been made. And where additional damages accrue by reason of a failure to comply with a lower court order during the period when the effect of that order is stayed for purposes of an appeal, the beneficiary of the lower court decree is entitled, on affirmance of the award in his favor, to recover for such accrued damages.

The Board concluded that in the future it would not, as a general practice, toll backpay for the period between a Trial Examiner's decision recommending dismissal and the Board finding of a violation. It stated that in the future "monetary awards will be granted in the light of the facts of each case and may be tolled as in the past where the circumstances warrant it" (137 NLRB at 31).

The considerations which led the Board to abandon a strict tolling policy in *A.P.W.* apply equally in cases where the Board finds no violation and is reversed by a court of appeals. Indeed, the fact that the Board had never tolled in the latter class of cases was one of the reasons for the Board's reversal of *Haffelfinger*. See *A.P.W.*, *supra*, at 29. Accordingly, since *A.P.W.* the Board has repeatedly ordered backpay without tolling where its decision of no violation has been

reversed by a court of appeals. See, for example, *Cushman Motor Delivery Co.*, 150 NLRB No. 154, 58 LRRM 1297; *Continental Can Co., Inc.*, 149 NLRB No. 92, 57 LRRM 1447; *Bethlehem Steel Co. (Shipbuilding Division)*, 147 NLRB No. 151, 56 LRRM 1352.

There have, however, since *A.P.W.*, been isolated cases in which the Board has found that the existence of unusual circumstances warranted a tolling of backpay following a judicial reversal of its decision of no violation. See *Kohler Co.*, 148 NLRB No. 147, 57 LRRM 1148, enforced U.S. App. D.C. , F. 2d , 58 LRRM 2847, and *Walls Mfg. Co.*, 137 NLRB 1317, 1318-1319, enforced, 116 U.S. App.d D.C. 140, 321 F. 2d 753, cert. denied, 375 U.S. 923. In addition, the Board tolled in *Fibreboard Paper Products, Corp.*, 138 NLRB 550, 555, enforced, 116 U.S. App. D.C. 198, 322 F. 2d 411, cert. denied, on this point, 375 U.S. 974, in which, on reconsideration, the Board reversed its own prior finding of no violation. The Company relies on these cases and asserts that in not tolling here the Board is acting arbitrarily.[18]

Each of the foregoing cases is, however, distinguishable from the instant case in one very significant respect—that is, in each of them the Board was convinced that the employer, in declining to reinstate employees ultimately found to have been discriminated

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[18] The Company also cites *Oregon Teamsters' Security Plan Office*, 119 NLRB 207. This case, however, antedated the change of policy announced in *A.P.W.*

against, was acting in justifiable reliance on the Board's original decision. Thus, in *Kohler*, where the Board's original decision (128 NLRB 1062) was that certain strikers were not entitled to reinstatement, and the Board later found they were so entitled, tolling was "guided particularly by the fact that the [strikers'] offer to return to work was made a few days after the issuance of the Board's original decision" (57 LRRM at 1156). In *Fibreboard*, where the Board, on reconsideration, held that the employer had violated the Act by subcontracting certain work and discharging certain employees without prior consultation with the Union, it was not merely reversing its original decision, but was finding unlawful conduct which employers for years had generally assumed to be lawful. Finally, in *Walls*, not only had the Board originally dismissed the complaint against the employer, but the Trial Examiner had done so as well. Thus, there also the Board was convinced that the employer had relied, and justifiably so, on its decision dismissing the complaint and ought not be held liable for backpay during the period of such reliance.

In the instant case, however, it is perfectly plain that the Company placed *no* reliance on the Board's original dismissal of the complaint in deciding not to rehire Burns. Thus, the Company argues at some length in its brief (pp. 46-47) that regardless of whether it discharged Burns for discriminatory reasons, the Board should not have required his reinstatement because a "basic antagonism existed between Burns and petitioner's supervisors that would

preclude future harmonious relations between them." Then, after detailing Burns' alleged misconduct, it concludes that such conduct "clearly portends ill for all concerned should this Court now force a renewal of the employment relationship." We submit that by arguing with such vehemence that Burns' misconduct makes him unfit for further employment with it, the Company has made it plain that its past refusal to reinstate him was not predicated on reliance on the Board's original dismissal of the complaint, but rather on its own views as to the desirability of Burns' employment. That the Company has relied on its *own* views as to whether Burns should be reinstated, rather than those of the Board, is further borne out by its refusal, when the Board subsequently ordered Burns reinstated, to comply with the Board's order.

To sum up, in view of the powerful arguments against tolling backpay—primarily that to do so benefits the wrongdoer at the expense of the wronged—the Board has, since *APW*, tolled only where it was convinced that the employer, in deciding to reinstate employees ultimately found to have been discriminated against, had justifiably relied on the Board's original finding of no violation. In the instant case, it is evident that the Company's refusal to reinstate Burns was not predicated on reliance on the Board's decision, but on its own views as to Burns' suitability for reemployment. Hence the Board was not acting arbitrarily in declining to toll backpay for the period from its original decision to its supplemental decision.

C. *The Board properly ordered the Company to offer Burns reinstatement*

Equally without merit is the Company's assertion that Burns' reinstatement should not be ordered because of his disrespectful attitude and improper conduct towards his supervisors (Brief, p. 46). If this conduct, all of which occurred prior to Burns' discharge, were as distasteful to the Company as it now claims, it presumably would have discharged Burns for engaging in that conduct. In fact, however, it discharged him because of his Union activity. Under these circumstances, the Company can hardly argue now that Burns' conduct was so incompatible with the employer-employee relationship that reinstatement, the normal remedy for a discriminatory discharge, and "the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union",[19] ought not to be ordered. Cf. *N.L.R.B.* v. *Anchor Rome Mills*, 228 F. 2d 775, 782 (C.A. 5), cert. dismissed, 352 U.S. 802 (Shiflett and Lee). In any event, Burns' alleged misconduct, none of which was regarded as sufficiently serious even to be mentioned to him at the time it occurred, was plainly not of such serious character as to render him unfit for further service. Contrast *Nutone, Inc.*, 112 NLRB 1153, 1171-1173 (Marshall), aff'd, 100 U.S. App. D.C. 170, 171-172, 243 F. 2d 593, 595-596, reversed on a different issue, 357 U.S. 357.

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[19] *Local 833, UAW-AFL-CIO* v. *N.L.R.B.*, 112 U.S. App. D.C. 107, 111, 300 F. 2d 699, 702, cert. denied, 370 U.S. 911.

CONCLUSION

For the reasons stated, we respectfully submit that the Board's findings are supported by substantial evidence on the record as a whole, that its conclusions and order are proper in all respects, and that a decree should issue enforcing the order in full.

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